

No. 16-1540

Title:	Donald J. Trump, President of the United States, et al., Petitioners v. Hawaii, et al.
Docketed:	June 26, 2017
Linked with 16A1191, 17A275	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(17-15589)
Decision Date:	June 12, 2017

Questions Presented

DATE	PROCEEDINGS AND ORDERS
Jun 01 2017	Application (16A1191) for a stay pending appeal, submitted to Justice Kennedy.
Jun 02 2017	Response to application due on or before 3 p.m., Monday, June 12, 2017.
Jun 02 2017	Application (16A1191) referred to the Court.
Jun 09 2017	Motion (16A1190, 16A1191) for leave to file amici brief filed by Association of American Medical Colleges and Others, in support of respondents.
Jun 09 2017	Motion for leave to file amicus brief filed by American Center for Law and Justice.
Jun 12 2017	Response to application from respondents Hawaii, et al. filed.
Jun 12 2017	Motion (16A1190, 16A1191) for leave to file amicus brief filed by The Becket Fund for Religious Liberty in support of neither party.
Jun 12 2017	Motion (16A1190, 16A1191) for leave to file amici brief filed by Constitutional Law Scholars in support of respondents.
Jun 12 2017	Motion (16A1190, 16A1191) for leave to file amicus brief filed by Eagle Forum Education & Legal Defense Fund, Inc. in support of petitioners.
Jun 12 2017	Motion (16A1190, 16A1191) for leave to file amici brief filed by Former National Security Officials in support of respondents.
Jun 12 2017	Motion (16A1191) for leave to file amicus brief filed by American Professional Society on Abuse of Children in support of respondents.
Jun 12 2017	Motion (16A1190, 16A1191) for leave to file amici brief filed by The States of Virginia, et al. in opposition to the stay applications.
Jun 12 2017	Motion (16A1190, 16A1191) for leave to file amici brief filed by Interfaith Group of Religious and Interreligious Organizations.
Jun 13 2017	Letter of applicants Donald J. Trump, President of the United States, et al. received. (Distributed)
Jun 13 2017	Letter of respondents Hawaii, et al. received. (Distributed)
Jun 13 2017	In consideration of the June 13, 2017 letters received from applicants and respondents, applicants are directed to file a supplemental brief on or before 3 p.m., Thursday, June 15, 2017. Respondents are directed to file a response on or before 12 p.m., Tuesday,

	June 20, 2017. Applicants are directed to file a reply on or before 12 p.m., Wednesday, June 21, 2017.
Jun 15 2017	Supplemental brief of applicants Donald J. Trump, President of the United States, et al. filed.
Jun 20 2017	Response to supplemental brief of respondents Hawaii, et al. filed.
Jun 21 2017	Reply of applicants Donald J. Trump, President of the United States, et al. filed.
Jun 26 2017	Petition for a writ of certiorari filed.
Jun 26 2017	Application (16A1191) and application (16A1190) are GRANTED IN PART. In addition, application (16A1191) is treated as a petition for a writ of certiorari. The petitions for writs of certiorari in 16-1436 and 16-1540 are GRANTED and the cases are consolidated for argument. In addition to the issues identified in the petitions, the parties are directed to address the following question: "Whether the challenges to Sec. 2(c) became moot on June 14, 2017." Justice Thomas, with whom Justice Alito and Justice Gorsuch join, concurring in part and dissenting in part. Opinion per curiam. (Detached Opinion). VIDED.
Jun 26 2017	The due dates for the briefs on the merits in 16-1436 and 16-1540 are as provided for by Rule 25 of the Rules of this Court. VIDED.
Jul 15 2017	Motion for clarification filed by petitioners Donald J. Trump, President of the United States, et al.
Jul 15 2017	Response to motion for clarification due on or before 12 p.m., Tuesday, July 18, 2017.
Jul 17 2017	Consent to the filing of amicus curiae briefs in support of either party or neither party from counsel for the petitioners. VIDED
Jul 18 2017	Response to motion for clarification from respondents Hawaii, et al. filed.
Jul 18 2017	Motion for leave to file amici curiae brief of Former National Security Officials in opposition to motion for clarification filed. (Distributed)
Jul 18 2017	Motion for leave to file amici curiae brief of Law Professors in opposition to motion for clarification filed. (Distributed)
Jul 18 2017	Motion for leave to file amici curiae brief of Members of Congress in opposition to motion for clarification filed. (Distributed)
Jul 18 2017	Motion for leave to file amici curiae brief of The International Refugee Assistance Project, et al. in opposition to motion for clarification filed. (Distributed)
Jul 18 2017	Motion for leave to file amici curiae brief of States of New York, et al. in opposition to motion for clarification filed. (Distributed)
Jul 18 2017	Reply of petitioners Donald J. Trump, President of the United States, et al. on motion for clarification filed.
Jul 19 2017	The Government's motion seeking clarification of our order of June 26, 2017, is denied. The District Court order modifying the preliminary injunction with respect to refugees covered by a formal assurance is stayed pending resolution of the Government's appeal to the Court of Appeals for the Ninth Circuit. Justice Thomas, Justice Alito, and Justice Gorsuch would have stayed the District Court order in its entirety.
Jul 19 2017	SET FOR ARGUMENT on Tuesday, October 10, 2017. VIDED.
Jul 20 2017	Letter of respondents Hawaii, et al. received. (Distributed)
Jul 26 2017	Application (17A 132) of Donald J. Trump, President of the United States, et al. to file a consolidated petitioners' brief on the merits and a consolidated reply brief on the merits in excess of the word limits, submitted to The Chief Justice. VIDED.

Jul 31 2017	Application (17A132) granted by The Chief Justice to file a consolidated petitioners' brief on the merits and a consolidated reply brief on the merits in excess of the word limits. VIDED.
Aug 01 2017	Record requested from U.S.C.A. 4th Circuit.
Aug 03 2017	Brief amici curiae of Public Policy Legal Institute and Center for Competitive Politics in support of neither party filed. VIDED.
Aug 07 2017	Brief amicus curiae of The Criminal Justice Legal Foundation in support of neither party filed. VIDED.
Aug 08 2017	Motion to add John Doe as a party filed by respondents Hawaii, et al.
Aug 10 2017	Joint appendix filed (3 volumes). VIDED.
Aug 10 2017	Brief of petitioners Trump, President of U.S., et al. filed. VIDED.
Aug 14 2017	CIRCULATED.
Aug 15 2017	Brief amicus curiae of Professor Victor Williams filed. VIDED. (Distributed)
Aug 16 2017	Brief amicus curiae of American Center for Law and Justice filed. VIDED. (Distributed)
Aug 16 2017	Motion for enlargement of time for oral argument and for divided argument filed by respondents. VIDED.
Aug 17 2017	Brief amici curiae of Texas, et al. filed. VIDED. (Distributed)
Aug 17 2017	Response to motion to add John Doe as a party filed by petitioners Trump, President of U.S., et al.
Aug 17 2017	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed. VIDED. (Distributed)
Aug 17 2017	Brief amici curiae of Hardwired Global, et al. in support of neither party filed. VIDED. (Distributed)
Aug 17 2017	Brief amicus curiae of Becket Fund for Religious Liberty in support of neither party filed. VIDED. (Distributed)
Aug 17 2017	Brief amicus curiae of American Civil Rights Union filed. VIDED. (Distributed)
Aug 17 2017	Brief amicus curiae of Zionist Organization of America filed. VIDED. (Distributed)
Aug 17 2017	Brief amici curiae of National Security Experts Andrew C. McCarthy, et al. filed. VIDED. (Distributed)
Aug 17 2017	Brief amici curiae of Scholars of Mormon History & Law in support of neither party filed. VIDED. (Distributed)
Aug 17 2017	Brief amici curiae of Citizens United, et al. filed. VIDED. (Distributed)
Aug 17 2017	Motion for leave to file amicus brief filed by Foundation for Moral Law. VIDED.
Aug 17 2017	Brief amicus curiae of Immigration Reform Law Institute filed. VIDED. (Distributed)
Aug 17 2017	Brief amicus curiae of Southeastern Legal Foundation filed. VIDED. (Distributed)
Aug 17 2017	Brief amici curiae of American Legislators in Support of Judicial Restraint filed. VIDED. (Distributed)
Aug 22 2017	Reply in support of motion to add John Doe as a party filed by respondents Hawaii, et al.
Aug 22 2017	Brief amicus curiae of The Roderick and Solange MacArthur Justice Center filed. VIDED. (Distributed)
Aug 24 2017	Further consideration of the motion of respondents Hawaii, et al. to add John Doe as a party to 16-1540 is deferred to the hearing of the case on the merits. VIDED.
Sep 05 2017	Brief amici curiae of Interfaith Coalition filed. VIDED. (Distributed)
Sep 06 2017	Brief amicus curiae of T.A., a United States Citizen of Yemeni Descent filed. VIDED. (Distributed)
Sep 07 2017	Brief amicus curiae of National CIS Council 119 filed. VIDED. (Distributed)
Sep 08 2017	Brief amici curiae of Chicago, Los Angeles, et al. filed. VIDED. (Distributed)

Sep 09 2017	Brief amicus curiae of Cato Institute filed. VIDED. (Distributed)
Sep 11 2017	Application (17A275) for a stay of mandate.
Sep 11 2017	Brief of respondents Hawaii, et al. filed. (Distributed)
Sep 11 2017	IT IS ORDERED that the mandate of the United States Court of Appeals for the Ninth Circuit, case No. 17-16426, is hereby stayed with respect to refugees covered by a formal assurance, pending receipt of a response, due on or before Tuesday, September 12, 2017, by 12 p.m., and further order of the undersigned or of the Court.
Sep 12 2017	Response to application from respondents Hawaii, et al. filed.
Sep 12 2017	Brief amici curiae of International Law Scholars and Nongovernmental Organizations filed. VIDED. (Distributed)
Sep 12 2017	Reply of applicants Trump, President of U.S., et al. filed.
Sep 12 2017	Motion for leave to file amici brief and motion for leave to file brief in compliance with Rule 33.2 filed by International Refugee Assistance Project and HIAS, Inc.
Sep 12 2017	Motion for leave to file amicus brief and motion for leave to file brief in compliance with Rule 33.2 filed by U.S. Committee for Refugees and Immigrants.
Sep 12 2017	Motion for leave to file amici brief and motion for leave to file brief in compliance with Rule 33.2 filed by Lutheran Immigration and Refugee Service, et al.
Sep 12 2017	Motion for leave to file amicus brief filed by United States Conference of Catholic Bishops
Sep 12 2017	Application (17A275) referred to the Court.
Sep 12 2017	The application for stay of mandate presented to Justice Kennedy and by him referred to the Court is granted, and the issuance of the mandate of the United States Court of Appeals for the Ninth Circuit in case No. 17-16426 is stayed with respect to refugees covered by a formal assurance, pending further order of this Court.
Sep 13 2017	Brief amicus curiae of Freedom from Religion Foundation filed. VIDED. (Distributed)
Sep 13 2017	Brief amicus curiae of David Boyle filed. VIDED. (Distributed)
Sep 13 2017	Brief amici curiae of Civil Rights Organizations filed. VIDED. (Distributed)
Sep 14 2017	Brief amicus curiae of Japanese American Citizens Leaque filed. VIDED. (Distributed)
Sep 14 2017	Brief amici curiae of Anti-Defamation League, et al. filed. VIDED. (Distributed)
Sep 14 2017	Brief amicus curiae of Khizr Khan filed. VIDED. (Distributed)
Sep 14 2017	Brief amici curiae of 37 Appellate Lawyers filed. VIDED. (Distributed)
Sep 15 2017	Brief amicus curiae of American Jewish Committee filed. VIDED. (Distributed)
Sep 15 2017	Brief amicus curiae of KARAMAH filed. VIDED. (Distributed)
Sep 15 2017	Brief amici curiae of Episcopal Bishops filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of International Labor Organizations filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Immigration Family and Constitutional Law Professors filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Professors of Federal Courts Jurisprudence, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of The Foundation for the Children of Iran, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Constitutional Law Scholars Corey Brettschneider, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Pars Equality Center, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Tahirih Justice Center, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of United States Conference of Catholic Bishops, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of Port of Seattle filed. VIDED. (Distributed)

Sep 18 2017	Brief amici curiae of Members of Congress filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Colleges and Universities filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Constitutional Law Scholars Gabriel "Jack" chin, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Members of the Clergy, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of American-Arab Anti-Discrimination Committee filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of American Professional Society on the Abuse of Children filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of 161 Technology Companies filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Karen Korematsu, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of International Lawyers for International Law filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Association of Art Museum Directors, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of PEN American Center, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Social Science Scholars filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of American Council on Education, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Muslim Justice League, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Human Rights First, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Immigration Equality, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Former National Security Officials filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of American Bar Association filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of Massachusetts Technology Leadership Council, Inc. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of The Association of American Medical Colleges, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Scholars of Federal Jurisdiction filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Certain Immigrant Rights Organizations filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Executive Branch Officials filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Refugee Organizations filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Interfaith Group of Religious and Interreligious Organizations filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of Syrian Asylee Ahmad M. filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of National Education Association filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Immigration Law Scholars filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of The National Asian Pacific American Bar Association, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amicus curiae of New York University filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Advocates for Human Rights, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Hussam Ayloush, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Howard University Scool of Law Civil Rights Clinic, et al. filed. VIDED. (Distributed)
Sep 18 2017	Brief amici curiae of Janet A. Napolitano and other Former Federal Immigration Officials filed. VIDED. (Distributed)

Sep 18 2017	Brief amici curiae of States of New York, et al., filed. VIDED. (Distributed)
Sep 24 2017	Letter of petitioners Donald J. Trump, President of the United States, et al. received. (Distributed). VIDED
Sep 25 2017	The parties are directed to file letter briefs addressing whether, or to what extent, the Proclamation issued on September 24, 2017, may render cases No. 16-1436 and 16-1540 moot. The parties should also address whether, or to what extent, the scheduled expiration of Sections 6(a) and 6(b) of Executive Order No. 13780 may render those aspects of case No. 16-1540 moot. The briefs, limited to 10 pages, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before noon, Thursday, October 5, 2017. The cases are removed from the oral argument calendar, pending further order of the Court. VIDED
Oct 04 2017	Reply of petitioners Donald J. Trump, President of United States, et al. filed. VIDED. (Distributed)
Oct 05 2017	Supplemental brief of petitioners Trump, President of U.S., et al. filed. VIDED. (Distributed)
Oct 05 2017	Supplemental brief of respondents Hawaii, et al. filed. (Distributed)
Oct 05 2017	Letter of respondents Hawaii, et al. filed. (Distributed)
Oct 24 2017	We granted certiorari in this case to resolve a challenge to the temporary suspension of entry of aliens and refugees under Section 2(c) and Section 6 of Executive Order No. 13,780. Because those provisions of the Order have "expired by [their] own terms," the appeal no longer presents a "live case or controversy." Burke v. Barnes, 479 U. S. 361, 363 (1987). Following our established practice in such cases, the judgment is therefore vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to dismiss as moot the challenge to Executive Order No. 13,780. United States v. Munsingwear, Inc., 340 U. S. 36, 39 (1950). We express no view on the merits. Justice Sotomayor dissents from the order vacating the judgment below and would dismiss the writ of certiorari as improvidently granted.
Oct 24 2017	Letter of petitioners filed. VIDED. (Distributed)

NAME	ADDRESS	PHONE
Attorneys for Petitioners		
Noel J. Francisco Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	(202) 514-2217
Party name: Trump, President of U.S., et al.		
Attorneys for Respondents		
Omar Cassim Jadwat Counsel of Record	125 Broad Street 18th Floor New York, NY 10004 ojadwat@aclu.org	(212) 549-2500
Party name: Int'l Refugee Assistance Project, et al.		

Neal K. Katyal
Counsel of Record

Hogan Lovells US LLP
555 Thirteenth Street, NW
Washington, DC 20004

neal.katyal@hoganlovells.com

(202) 637-5600

Party name: Hawaii, et al.

Other

Bruce D. Abramson
Counsel of Record

University of Baltimore School of Law
1420 North Charles Street
Baltimore, MD 22101

gdolin@ubalt.edu

(410) 837-4610

Party name: Hardwired Global, et al.

Amir Hatem Mahdy Ali
Counsel of Record

Roderick & Solange
MacArthur Justice Center
718 7th Street, NW
Washington, DC 20001

amir.ali@macarthurjustice.org

(202) 869-3434

Party name: The Roderick and Solange MacArthur Justice Center

Mark A. Aronchick
Counsel of Record

Hangley, Aronchick, Segal, Pudlin & Schiller
One Logan Square, 27th Floor
Philadelphia, PA 19103

maronchick@hangley.com

(215) 568-6200

Party name: Immigration, Family, and Constitutional Law Professors

Lynne Bernabei
Counsel of Record

Bernabei & Kabat, PLLC
1400 - 16th Street, N.W., Suite 500
Washington, DC 20036-2223

Bernabei@Bernabeipllc.com

(202) 745-1942

Party name: Civil Rights Organizations

Richard Douglas Bernstein
Counsel of Record

Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, DC 20006

rbernstein@willkie.com

(202) 303-1000

Party name: T.A., a United States Citizen of Yemeni descent

Charles A. Bird
Counsel of Record

4182 Ingalls Street
San Diego, CA 92103

(619) 699-2406

birdamicus17@gmail.com

Party name: 37 Appellate Lawyers

Lisa Schiavo Blatt
Counsel of Record

Arnold & Porter Kaye Scholer, LLP
601 Massachusetts Avenue, NW
Washington, DC 20001

(202) 942-5000

lisa.blatt@apks.com

Party name: Pars Equality Center, et al.

David Christopher Boyle
Counsel of Record

PO Box 15143
Long Beach, CA 90815

(734) 904-6132

dbo@boyleslaw.org

Party name: David Boyle

Richard P. Bress
Counsel of Record

Watkins & Watkins, LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004

(202) 637-2200

richard.bress@lw.com

Party name: Refugee Organizations

Daniel L. Brown
Counsel of Record

Sheppard, Mullin, LLP
30 Rockefeller Plaza
New York, NY 10112

(212) 634-3095

dlbrown@sheppardmullin.com

Party name: KARAMAH

George Eric Brunstad
Counsel of Record

Dechert, LLP
90 State House Square
Hartford, CT 06013

(860) 524-3999

eric.brunstad@dechert.com

Party name: Human Rights First, et al.

Walter Dellinger
Counsel of Record

Duke School of Law
210 Science Drive
Durham, NC 27707-0000

(202) 383-5319

wdellinger@omm.com

Party name: Japanese American Citizens League

Muhammad Usman Faridi
Counsel of Record
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000

mfaridi@pbwt.com

Party name: National CIS Council 119

Aaron Xavier Fellmeth
Counsel of Record
Sandra Day O'Connor College of Law,
Mail Code 9520
Arizona State Univ., 111 E. Taylor St.
Phoenix, AZ 85004-4467
(480) 727-8575

aaron.fellmeth@asu.edu

Party name: International Law Scholars and Nongovernmental Organizations

Chad Ian Golder
Counsel of Record
Munger Tolles & Olson, LLP
1155 F Street, NW
7th Floor
Washington, DC 20004
(202) 220-1100

chadgolder@mto.com

Party name: American Council on Education, et al.

Eric James Gorman
Counsel of Record
Skadden, Arps, Slate, Meagher & Flom, LLP
155 North Wacker Drive
Suite 2800
Chicago, IL 60606
(312) 407-0700

eric.gorman@skadden.com

Party name: Immigration Equality, et al.

John B. Harris
Counsel of Record
Frankfurt Kurnit Klein & Selz, P.C.
488 Madison Avenue
New York, NY 10022
(212) 705-4823

jharris@fkks.com

Party name: Anti-Defamation League, et al.

Lindsay C. Harrison
Counsel of Record
Jenner and Block, LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000

lharrison@jenner.com

Party name: Colleges and Universities

Marc Andrew Hearron
Counsel of Record
Morrison Foester, LLP
2000 Pennsylvania Avenue, NW, Suite 6000
Washington, DC 20006
(202) 778-1663
mhearron@mofo.com
Party name: Interfaith Group of Religious and Interreligious Organizations

Aziz Huq
Counsel of Record
University of Chicago
1111 E. 60th Street
Chicago, IL 60622
(773) 702-9566
huq@uchicago.edu
Party name: Social Science Scholars

Darin Edward-Wesley Johnson
Counsel of Record
Howard University School of Law
Civil Rights Clinic
2900 Van Ness St. NW
Washington, DC 20008
(202) 807-8067
darin.johnson@law.howard.edu
Party name: Howard University School of Law Civil Rights Clinic, et al.

Lawrence J. Joseph
Counsel of Record
1250 Connecticut Avenue
Suite 200
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com
Party name: Eagle Forum Education & Legal Defense Fund

Roberta A Kaplan
Counsel of Record
Kaplan & Company, LLP
350 Fifth Avenue, Suite 7110
New York, NY 10118
(212)-763-0883
rkaplan@kaplanandcompany.com
Party name: Constitutional Law Scholars Corey Brettschneider, et al.

Peter Karanjia
Counsel of Record
Davis, Wright, Tremaine, LLP
1919 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 973-4256
peterkaranjia@dwt.com
Party name: Members of Congress

Richard Brian Katskee
Counsel of Record

Americans United for Separation
of Church and State
1310 L Street, NW, Suite 200
Washington, DC 20005

katskee@au.org

(202) 466-3234

Party name: Members of the Clergy, et al.

John W Keker
Counsel of Record

Keker, Van Nest & Peters, LLP
633 Battery Street
San Francisco, CA 94111

jkeker@keker.com

(415) 391-5400

Party name: Khizr Khan

Scott Keller
Counsel of Record

Office of the Attorney General
P.O. Box 12548 (MC)
Austin, TX 78711-2548

scottkeller@texas.gov

(512) 936-1700

Party name: Texas, et al.

Harold Hongju Koh
Counsel of Record

Rule of Law Clinic, Yale Law School
127 Wall Street
New Haven, CT 06520-8215

harold.koh@ylsclinics.org

(203) 432-4932

Party name: Former National Security Officials

Vincent Gregory Levy
Counsel of Record

Holwell Shuster & Goldberg, LLP
750 Seventh Avenue, 26th Floor
New York, NY 10019

vlevy@hsglip.com

(646) 837-5151

Party name: Syrian Asylee Ahmed M.

Joshua Seth Lipshutz
Counsel of Record

Gibson, Dunn & Crutcher, LLP
333 South Grand Avenue
Suite 3000
Los Angeles, CA 90071

jlipshutz@gibsondunn.com

(213) 229-7000

Party name: United States Conference of Catholic Bishops, et al.

David Yury Livshiz
Counsel of Record

Freshfields Bruckhaus Deringer, US, LLP
601 Lexington Avenue, 31st Floor
New York, NY 10022

david.livshiz@freshfields.com

(212) 277-4000

Party name: Cato Institute

Adam S. Lurie
Counsel of Record

Linklaters, LLP
601 13th St., Suite 400 South
Washington, DC 20005

adam.lurie@linklaters.com

(202) 654-9200

Party name: American Jewish Committee

Rebecca Susan Markert
Counsel of Record

Freedom from Religion Foundation
P.O. Box 750
Madison, WI 53701

rmarkert@ffrf.org

(608) 256-8900

Party name: Freedom from Religion Foundation

Kevin Paul Martin
Counsel of Record

Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210

kmartin@goodwinlaw.com

(617) 570-1000

Party name: Foundation for the Children of Ian

Alice Margaret O'Brien
Counsel of Record

National Education Association
1201 16th Street, N.W.
Washington, DC 20036

aobrien@nea.org

(202) 822-7035

Party name: National Education Association

Mary Kelly Persyn
Counsel of Record

Persyn Law & Policy
912 Cole Street, PMB 124
San Francisco, CA 94117

marykelly@persynlaw.com

(628) 400-1254

Party name: American Professional Society on the Abuse of Children

Andrew John Pincus
Counsel of Record

Mayer Brown, LLP
1999 K Street, NW
Washington, DC 20006

(202) 263-3000

apincus@mayerbrown.com

Party name: 161 Technology Companies

Michael William Price
Counsel of Record

Brennan Center for Justice at
NY University School of Law
120 Broadway, Suite 1750
New York, NY 10271

(646) 292-8335

michael.price@nyu.edu

Party name: Hussam Ayloush, et al.

Fred Anthony Rowley
Counsel of Record

Munger, Tolles & Olson, LLP
350 South Grand Avenue
Fiftieth Floor
Los Angeles, CA 90071

(213) 683-9100

fred.rowley@mto.com

Party name: Professors of Federal Courts, et al.

Kent Stephen Scheidegger
Counsel of Record

Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

(916) 446-0345

briefs@cjlf.org

Party name: Criminal Justice Legal Foundation in support of neither party

Michael Ramsey Scott
Counsel of Record

Hillis, Clark, Martin & Peterson, P.S.
999 Third Avenue, Suite 4600
Seattle, WA 98104

(206) 623-1745

michael.scott@hcmp.com

Party name: Episcopal Bishops

Jay Alan Sekulow
Counsel of Record

American Center for Law and Justice
201 Maryland Avenue, N.E.
Washington, DC 20002

(202) 546-8890

sekulow@aclj.org

Party name: American Center for Law and Justice

Benjamin Gross Shatz
Counsel of Record
Manatt, Phelps & Phillips, LLP
11355 West Olympic Boulevard
Los Angeles, CA 90064
(310) 312-4000
bshatz@manatt.com
Party name: Muslim Justice League, et al.

Matthew D. Slater
Counsel of Record
Cleary Gottlieb Steen & Hamilton LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 974-1500
mslater@cgsh.com
Party name: Lutheran Immigration and Refugee Service and Foster Parents

Deborah Lynn Smith
Counsel of Record
Service Employees International Union
1800 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 730-7168
debbie.smith@seiu.org
Party name: International Labor Organizations

Ilya Somin
Counsel of Record
Professor of Law, George Mason University
3301 Fairfax Dr.
Arlington, VA 22201
(703) 993-8069
somin@gmu.edu
Party name: Constitutional Law Scholars Gabriel "Jack" chin, et al.

Ellyde Roko Thompson
Counsel of Record
Quinn, Emanuel, Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7000
ellydethompson@quinnemanuel.com
Party name: Port of Seattle

Scott Lewis Winkelman
Counsel of Record
Crowell & Moring, LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2500
swinkelman@crowell.com
Party name: Tahirih Justice Center, et al.

Christopher J. Wright
Counsel of Record

Harris, Wiltshire & Grannis, LLP
1919 M Street, NW, Fl. 8
Washington, DC 20036

(202) 333-1300

cwright@hwglaw.com

Party name: American-Arab Anti-Discrimination Committee

Barnaby W. Zall
Counsel of Record

685 Spring St. #314
Friday Harbor, WA 98250

(360) 378-6600

bzall@bzall.com

Party name: Public Policy Legal Institute and Center for Competitive Politics in support of neither party

Mark A. Aronchick

One Logan Square, 27th Floor
Philadelphia, PA 19103

(215) 568-6200

maronchick@hangley.com

Party name: Law Professors

Brianne Jenna Gorod

Constitutional Accountability Center
1200 18th Street, NW
Suite 501
Washington, DC 20036

(202) 296-6889

brianne@theusconstitution.org

Party name: Members of Congress

Marc A. Hearron

Morrison & Forester LLP
2000 Pennsylvania Avenue, NW Suite 6000
Washington, DC 20006

(202) 778-1663

MHearron@mofo.com

Party name: Interfaith Group of Religious and Interreligious Organizations

Mariko Hirose

International Refugee Assistance Project
40 Rector Street, 9th Floor
New York, NY 10006

(646) 459-3044

mhirose@refugeerights.org

Party name: The International Refugee Assistance Project, et al.

Roberta A. Kaplan

Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064

(212) 373-3000

rkaplan@paulweiss.com

Party name: Constitutional Law Scholars

Harold Hongju Koh
Rule of Law Clinic
Yale Law School
127 Wall Street, P.O. Box 208215
New Haven, CT 06520-8215
(203) 432-4932
harold.koh@yale.edu
Party name: Former National Security Officials

Mary Kelly Persyn
Persyn Law & Policy
912 Cole Street PMB 124
San Francisco, CA 94117
(628) 400-1254
marykelly@persynlaw.com
Party name: American Professional Society on Abuse of Children

Stuart A. Raphael
Solicitor General of Virginia
Office of the Attorney General
202 North Ninth Street
Richmond, VA 23219
(804) 786-7240
sraphael@oag.state.va.us
Party name: The States of Virginia, et al.

Mark L. Rienzi
The Becket Fund for Religious Liberty
1200 New Hampshire Avenue, NW
Suite 700
Washington, DC 20036
(202) 955-0095
mrienzi@becketfund.org
Party name: The Becket Fund for Religious Liberty

Joshua David Rogaczewski
McDermott Will & Emery, LLP
The McDermott Building, 500 North Capitol
Street, Northwest
Washington, DC 20001
(202) 756-8195
jrogaczewski@mwe.com
Party name: Association of American Medical Colleges and Others, in support of respondents

Barbara D. Underwood
Solicitor General
Office of the Attorney General
120 Broadway, 25th Floor
New York, NY 10271-0332
(212) 416-8020
barbara.underwood@ag.ny.gov
Party name: States of New York, et al.

No. 16-1540 (16A1191)

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

STATE OF HAWAII, ET AL.

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **REPLY IN SUPPORT OF MOTION FOR CLARIFICATION OF JUNE 26, 2017, STAY RULING AND APPLICATION FOR TEMPORARY ADMINISTRATIVE STAY OF MODIFIED INJUNCTION**, via email and first-class mail, postage prepaid, this 18th day of July, 2017.

[See Attached Service List]

Jeffrey B. Wall
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001

July 18, 2017

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Supervisory Case Management Specialist, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

RECEIVED
JUL 19 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

16-1540
TRUMP, DONALD J., PRESIDENT OF THE UNITED STATES, ET AL.
HAWAII, ET AL.

MARK A. ARONCHICK (Mailed)
HANGLEY,ARONCHICK,SEGAL & PUDLIN
ONE LOGAN SQUARE
18TH & CHERRY STREETS
27TH FLOOR
PHILADELPHIA, PA 19103
215-568-6200
MARONCHICK@HANGLEY.COM

RICHARD D. BERNSTEIN (Mailed)
WILLKIE FARR & GALLAGHER LLP
1875 K STREET, NW
WASHINGTON, DC 20006
202-303-1000
RBERNSTEIN@WILLKIE.COM

DOUGLAS S. CHIN (Mailed)
ATTORNEY GENERAL
STATE OF HAWAII
425 QUEEN STREET
HONOLULU, HI 96813
808-568-1500
HAWAIIAG@HAWAII.GOV

BRIANNE J. GOROD (Mailed)
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18TH STREET, NW
SUITE 501
WASHINGTON, DC 20036
202-296-6889
BRIANNE@THEUSCONSTITUTION.ORG

MARC A. HEARRON (Mailed)
MORRISON & FOERSTER LLP
2000 PENNSYLVANIA AVE., N.W.
WASHINGTON , DC 20006
202-887-1500
MHEARRON@MOFO.COM

MARIKO HIROSE (Mailed)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
40 RECTOR STREET
9TH FLOOR
NEW YORK, NY 10006
646-459-3044
MHIROSE@REFUGEERIGHTS.ORG

OMAR C. JADWAT (E-Mail)
AMERICAN CIVIL LIBERTIES UNION
125 BROAD ST.
18TH FLOOR
NEW YORK, NY 10004-2400
212-549-2620
OJADWAT@ACLU.ORG
212-549-2654(Fax)

LAWRENCE J. JOSEPH (Mailed)
1250 CONN. AVE., NW
#200
WASHINGTON, DC 20036
202-355-9452
LJ@LARRYJOSEPH.COM

ROBERTA A. KAPLAN (Mailed)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 AVENUE OF THE AMERICANS
NEW YORK, NY 10019-6064
212-373-3000
RKAPLAN@PAULWEISS.COM

NEAL KUMAR KATYAL (E-Mail)
HOGAN LOVELLS US LLP
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004
202-637-5600
NEAL.KATYAL@HOGANLOVELLS.COM

HAROLD HONGJU KOH (Mailed)
RULE OF LAW CLINIC YALE LAW SCHOOL
NATIONAL LITIGATION PROJECT
YALE LAW SCHOOL
127 WALL ST.
NEW HAVEN, CT 06511
203-432-1660
HAROLD.KOH@YALE.EDU

MARY KELLY PERSYN (Mailed)
PERSYN LAW & POLICY
912 COLE STREET PMB 1234
SAN FRANCISCO , CA 94117
628-400-1254
MARYKELLY@PERSYNLAW.COM

STUART A. RAPHAEL (Mailed)
OFFICE OF THE VIRGINIA ATTORNE
GENERAL
202 NORTH NINTH STREET
RICHMOND, VA 23219
804-786-7240
SRAPHAEL@OAG.STATE.VA.US

MARK J. RIENZI (Mailed)
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVENUE, NW
SUITE 700
WASHINGTON , DC 20036
202-955-0095
MRIENZI@BECKETFUND.ORG

JOSHUA DAVID ROGACZEWSKI (Mailed)
MCDERMOTT WILL & EMERY
THE MCDERMOTT BUILDING
500 NORTH CAPITOL STREET, NW
WASHINGTON, DC 20001-1531
202-758-8195
JROGACZEWSKI@MWE.COM

JAY ALAN SEKULOW (Mailed)
AMERICAN CENTER FOR LAW AND JUSTICE
201 MARYLAND AVE., NE
WASHINGTON, DC 20002
202-546-8890
SEKULOW@ACLJ.ORG

BARBARA D. UNDERWOOD (Mailed)
NY STATE OFFICE OF THE ATTORNEY
GENERAL
120 BROADWAY, 25 FLOOR
NEW YORK , NY 10271-0332
212-416-8016
BARBARA.UNDERWOOD@AG.NY.GOV

16-1540

Supreme Court, U.S.
FILED
JUN 01 2017
OFFICE OF THE CLERK

No. A-

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, ET AL., APPLICANTS

v.

STATE OF HAWAII, ET AL.

APPLICATION FOR STAY PENDING APPEAL
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RECEIVED
JUN 2 - 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PARTIES TO THE PROCEEDING

The applicants (defendants-appellants below) are Donald J. Trump, in his official capacity as President of the United States; the Department of Homeland Security; the Department of State; John F. Kelly, in his official capacity as Secretary of Homeland Security; Rex W. Tillerson, in his official capacity as Secretary of State; and the United States of America.

The respondents (plaintiffs-appellees below) are the State of Hawaii and Dr. Ismail Elshikh.

IN THE SUPREME COURT OF THE UNITED STATES

No. A-_____

DONALD J. TRUMP, ET AL., APPLICANTS

v.

STATE OF HAWAII, ET AL.

APPLICATION FOR STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General, on behalf of applicants President Donald J. Trump, et al., respectfully applies for a stay of the preliminary injunction issued by the United States District Court for the District of Hawaii, pending the consideration and disposition of the government's appeal from that injunction to the United States Court of Appeals for the Ninth Circuit and, if the court of appeals affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

The Constitution and Acts of Congress confer on the President broad authority to prevent aliens abroad from entering this country when he deems it in the Nation's interest. Exercising that

authority, and after consulting with the Secretaries of State and Homeland Security and the Attorney General, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order). Section 2 of that Order directs a worldwide review of the visa-adjudication process, and while that review is ongoing, Section 2(c) suspends for 90 days the entry of foreign nationals from six countries that sponsor or shelter terrorism (Iran, Libya, Somalia, Sudan, Syria, and Yemen), subject to case-by-case waivers. The President chose those countries for two reasons: Congress and the Executive previously had identified them as presenting heightened terrorism-related risks, and the President made the national-security judgment that conditions in those countries may render them unable or unwilling to provide our government with information needed to detect possible threats.

Section 6 of the Order directs a similar review of the U.S. Refugee Admission Program (Refugee Program), suspends for 120 days adjudication of refugee applications and travel under the Refugee Program for aliens from any country, and reduces the maximum number of refugees who may be admitted in Fiscal Year 2017. The Order explains that "[t]errorist groups have sought to infiltrate several nations through refugee programs," and "individuals who first entered the country as refugees" have "been convicted of terrorism-related crimes in the United States." Order § 1(b)(iii) and (h).

In another suit challenging the Order, the United States District Court for the District of Maryland entered a global injunction barring implementation of Section 2(c)'s temporary suspension of entry of nationals from the six designated countries, concluding that it likely violates the Establishment Clause. IRAP v. Trump, No. 17-361, 2017 WL 1018235 (Mar. 16, 2017). The government immediately appealed and sought a stay. On May 25, 2017, the Fourth Circuit, sitting en banc, affirmed that injunction in principal part over three separate dissents and denied a stay. IRAP v. Trump, No. 17-1351, 2017 WL 2273306. The government is today filing a petition for a writ of certiorari seeking review of that decision, as well as an application for a stay of that preliminary injunction pending disposition of the petition.

The district court in this separate suit challenging the Order went even further. On the basis of alleged injury to a single individual (Dr. Ismail Elshikh) and the State of Hawaii (collectively respondents), the district court preliminarily enjoined all of Sections 2 and 6 of the Order. Thus, in addition to Section 2(c)'s temporary suspension of entry of nationals of six countries, the district court's injunction here also enjoins (1) the temporary suspension of the Refugee Program, (2) the provision reducing the maximum number of refugees who may be admitted in Fiscal Year 2017, and (3) multiple provisions of Sections 2 and 6 that address only internal and diplomatic

governmental activities, such as agency reviews of existing screening and vetting protocols. Respondents barely mentioned any of these provisions in seeking to restrain the Order.

In issuing its sweeping injunction, the district court did not apply the test in Kleindienst v. Mandel, 408 U.S. 753 (1972), for challenges to the denial of entry to aliens from outside the United States, and ask whether the President's national-security judgment is "a facially legitimate and bona fide reason" for Sections 2 and 6. Id. at 770. The court instead declined to apply Mandel's test, holding that the entire Order likely violates the Establishment Clause under case law from domestic contexts. The court did so not because the Order refers to, or distinguishes on the basis of, religion: Sections 2 and 6 apply to all nationals of the listed countries, and all refugees from any country, regardless of anyone's religion. The court reasoned instead that the Order is driven by religious animus. It based that conclusion largely on statements the President made as a political candidate in 2015 and 2016, before he took the oath to uphold the Constitution, formed an Administration, and consulted with Cabinet Members charged with keeping this Nation safe.

The government has appealed the district court's injunction to the Ninth Circuit and sought a stay pending appeal. After expedited briefing, a panel of that court heard oral argument on May 15, 2017. The Ninth Circuit has not yet ruled on the stay

request or on the merits. In light of the Fourth Circuit's decision upholding the IRAP court's injunction against Section 2(c) and denying a stay, the government respectfully requests a stay of the Hawaii court's injunction against Sections 2 and 6 pending appeal in the Ninth Circuit. Unless the injunction in this case is stayed, Section 2(c) of the Order will remain inoperative even if this Court grants a stay in IRAP pending its disposition of the government's petition for a writ of certiorari.

All of the relevant factors strongly support a stay of the injunction here. See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers). First, if the Ninth Circuit upholds the Hawaii court's injunction, there is a reasonable probability that this Court will grant certiorari. The injunction nullifies a formal national-security directive of the President -- including provisions that affect only internal and diplomatic activities of government agencies -- on the basis that the President purportedly acted with religious animus. Second, there is more than a fair prospect that the Court will vacate the injunction because respondents' claims are neither justiciable nor meritorious. Third, preventing the President from effectuating his national-security judgment will continue to cause irreparable harm to the interests of the government and the public. At a minimum, the injunction -- which bars enforcement of Sections 2 and 6 worldwide -- should be stayed

to the extent that it goes beyond addressing the entry of Dr. Elshikh's mother-in-law. See United States Dep't of Def. v. Meinhold, 510 U.S. 939 (1993).

For these reasons, the government respectfully requests that this Court enter a stay pending the government's appeal. In addition, the Court may construe this application as a petition for a writ of certiorari before judgment, see, e.g., Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (per curiam), and grant the petition along with the petition for a writ of certiorari in IRAP, while staying the injunction pending a final disposition.[1]

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., governs admission of aliens into the United States. Admission normally requires a valid visa or other valid travel document. See 8 U.S.C. 1181, 1182(a)(7)(A)(i) and (B)(i)(II), 1203. The process of applying for a visa typically includes an in-person interview and results in a decision by a State Department consular officer. 8 U.S.C. 1201(a)(1), 1202(h), 1204; 22 C.F.R. 42.62. Although a visa often is necessary for admission, it does

[1] Rule 23.3 of this Court provides that, "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought" in the court below. The government has requested the relief sought here -- a stay of the Hawaii district court's injunction -- from the court of appeals, but that court has not yet ruled on the government's stay motion. Given the need for a stay in this case in light of the Fourth Circuit's decision in IRAP, "the relief sought is not available from any other court or judge." Ibid.

not guarantee admission; the alien still must be found admissible upon arriving at a port of entry. 8 U.S.C. 1201(h), 1225(a).

Congress has also created a Visa Waiver Program, enabling nationals of certain countries to seek temporary admission without a visa. 8 U.S.C. 1182(a)(7)(B)(iv); 8 U.S.C. 1187 (2012 & Supp. III 2015). In 2015, Congress excluded from travel under that Program aliens who are dual nationals of or recent visitors to Iraq or Syria -- where "[t]he Islamic State of Iraq and the Levant * * * maintain[s] a formidable force" -- and nationals of and recent visitors to countries designated by the Secretary of State as state sponsors of terrorism (Iran, Sudan, and Syria).[2] Congress also authorized the Department of Homeland Security (DHS) to designate additional countries of concern, considering whether a country is a "safe haven for terrorists," "whether a foreign terrorist organization has a significant presence" in it, and "whether the presence of an alien in the country * * * increases the likelihood that the alien is a credible threat to" U.S. national security. 8 U.S.C. 1187(a)(12)(D)(i) and (ii) (Supp. III 2015). Applying those criteria, in 2016, DHS excluded recent visitors to Libya, Somalia, and Yemen from travel under the Program.[3]

---

[2] U.S. Dep't of State, Country Reports on Terrorism 2015, at 6, 299-302 (June 2016), https://goo.gl/40GmOS; see 8 U.S.C. 1187(a)(12)(A)(i) and (ii) (Supp. III 2015).

[3] DHS, DHS Announces Further Travel Restrictions for the Visa Waiver Program (Feb. 18, 2016), https://goo.gl/OXTqb5.

Separately, the Refugee Program allows aliens who fear persecution on account of race, religion, nationality, or certain other grounds to seek admission. 8 U.S.C. 1101(a)(42), 1157. Refugees are screened for eligibility and admissibility abroad; if approved, they may be admitted without a visa. 8 U.S.C. 1157(c)(1), 1181(c). Congress authorized the President to determine the maximum number of refugees to be admitted each fiscal year. 8 U.S.C. 1157(a)(2) and (3).

Congress also has accorded the Executive broad discretion to suspend or restrict the entry of aliens. Section 1182(f) provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may * * * for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. 1182(f). Section 1185(a)(1) further grants the President broad authority to adopt "reasonable rules, regulations, and orders" governing entry of aliens, "subject to such limitations and exceptions as [he] may prescribe." 8 U.S.C. 1185(a)(1).

2. On January 27, 2017, the President issued Executive Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (January Order). It directed the Secretaries of Homeland Security and State to assess current screening procedures to determine whether they are sufficient to detect individuals seeking to enter this country to do it harm. Id. § 3(a) and (b). While that review was ongoing,

the January Order suspended for 90 days entry of foreign nationals of the seven countries already identified as posing heightened terrorism-related concerns in the context of the Visa Waiver Program, subject to case-by-case exceptions. Id. § 3(c) and (g). The January Order similarly directed a review of the Refugee Program, and, pending that review, suspended entry under that Program for 120 days, subject to case-by-case waivers. Id. § 5(a). It also suspended admission of Syrian refugees indefinitely and directed agencies to prioritize refugee claims of religious persecution if the religion was "a minority religion in the individual's country of nationality." Id. § 5(b) and (c).

The January Order was challenged in multiple courts. On February 3, 2017, a district court in Washington enjoined enforcement nationwide of the temporary entry suspension and certain refugee provisions. Washington v. Trump, No. 17-141, 2017 WL 462040 (W.D. Wash.). On February 9, 2017, a Ninth Circuit panel declined to stay that injunction pending appeal. Washington v. Trump, 847 F.3d 1151 (per curiam). While acknowledging that the injunction may have been "overbroad," the court declined to narrow it, concluding that "[t]he political branches are far better equipped" to do so. Id. at 1166, 1167.

3. Responding to the Ninth Circuit's decision, on March 6, 2017 -- in accordance with the recommendation of the Attorney General and Secretary of Homeland Security -- the President issued

the current Order, with an effective date of March 16, 2017.[4] The Order revokes the January Order, replacing it with significantly revised provisions that address the Ninth Circuit's concerns. Order § 13. At issue here are Sections 2 and 6 of the Order.

a. Section 2(c) temporarily suspends entry of certain nationals from six countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. The temporary suspension's explicit purpose is to enable the President -- based on the recommendation of the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence -- to assess whether current screening and vetting procedures are adequate to detect terrorists seeking to infiltrate the Nation. Order § 1(f). Each of the six countries "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." Id. § 1(b)(i) and (d). The Order details the circumstances in each country that give rise to "heightened risks" of terrorism and also "diminish[]" each "foreign government's willingness or ability to share or validate

---

[4] Order § 14; Letter from Jefferson B. Sessions III, Att'y Gen., & John Francis Kelly, Sec'y of Homeland Sec., to President Donald J. Trump (Mar. 6, 2017), https://goo.gl/H69g8I.

important information about individuals" needed to screen them properly. Id. § 1(d) and (e).[5]

The Order "suspend[s] for 90 days" the "entry into the United States of nationals of" those six countries. Order § 2(c). Addressing concerns the Ninth Circuit raised, however, the Order clarifies that the suspension applies only to aliens who (1) are outside the United States on the Order's effective date, (2) do not have a valid visa on that date, and (3) did not have a valid visa on the effective date of the January Order. Id. § 3(a). It explicitly excludes other categories of aliens, some of which had concerned courts, including (among others) any lawful permanent resident. Id. § 3(b). After the completion of the review, the Order directs the Secretary of Homeland Security, "in consultation with the Secretary of State and the Attorney General," to recommend countries "for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so," have an "adequate plan to do so," or have "adequately shared information through other means." Id. § 2(e).

The Order also contains a detailed provision permitting case-by-case waivers where denying entry "would cause undue hardship"

---

[5] Although the January Order had extended the suspension to Iraq, the Order omits Iraq from the suspension due to "the close cooperative relationship between" the U.S. and Iraqi governments, and the fact that, since the January Order, "the Iraqi government has expressly undertaken steps" to supply information necessary to help identify possible threats. Order § 1(g); see id. § 4.

and "entry would not pose a threat to national security and would be in the national interest." Order § 3(c). It lists illustrative circumstances for which waivers could be appropriate, including:

- individuals who seek entry "to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a [U.S.] citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa," id. § 3(c)(iv);

- individuals who were previously "admitted to the United States for a continuous period of work, study, or other long-term activity" but are currently outside the country and seeking to reenter, id. § 3(c)(i); and

- individuals who seek entry for "significant business or professional obligations," id. § 3(c)(iii).

Waivers can be requested, and will be acted on by a consular officer, "as part of the visa issuance process," or they may be granted by the Commissioner of U.S. Customs and Border Protection or his delegee. Id. § 3(c).

b. Section 6 of the Order suspends adjudication of applications under the Refugee Program and travel of refugees for 120 days to permit the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, to review the Refugee Program and "determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States." Order § 6(a). The suspension does not apply to refugee applicants who were formally scheduled for transit to the United States before the

Order's effective date, and it is also subject to case-by-case waivers. Id. § 6(a) and (c). Section 6(b) of the Order limits to 50,000 the number of refugees who may be admitted in Fiscal Year 2017. Unlike the January Order, the Order does not prioritize refugee claims by victims of religious persecution.

4. a. Respondents are the State of Hawaii and Dr. Elshikh. They filed suit in the District of Hawaii challenging the January Order. After the new Order issued, they filed their operative complaint and sought a temporary restraining order (TRO) against Sections 2 and 6 "across the nation." C.A. E.R. 173. Respondents claim that the Order exceeds the President's statutory authority and violates the Due Process and Establishment Clauses. C.A. E.R. 167-173. Hawaii alleges that the Order would adversely affect students and faculty at its state-run educational institutions, reduce tourism, and damage the public welfare. See C.A. E.R. 139-141. Dr. Elshikh is a Muslim U.S. citizen who lives in Hawaii with his wife and children. C.A. E.R. 142-143. He claims that his Syrian mother-in-law lacks a visa to enter the country and thus cannot visit him and his family in Hawaii. Ibid.

b. On March 15, 2017, after expedited briefing and argument, the district court entered a nationwide TRO barring enforcement of Sections 2 and 6 in their entirety. Addendum, infra (Add.), 25-67. The court held that Hawaii has standing based on alleged harms to its university system and tourism industry, and

that Dr. Elshikh has standing based on his allegation that he is harmed by the Order's purportedly discriminatory message. Add. 40-49. On the merits, the court held that respondents are likely to succeed on their claim that the Order violates the Establishment Clause. Add. 52-64. The court acknowledged that the Order "does not facially discriminate for or against any particular religion," but it held -- based primarily on campaign statements made by then-candidate Donald Trump and subsequent statements by his aides -- that "religious animus dr[ove] the promulgation of the [Order]." Add. 54, 57. The court "expresse[d] no view" on respondents' statutory or due-process claims. Add. 53 n.11.

c. On March 29, 2017, the district court converted the TRO to a preliminary injunction based on the same considerations. Add. 1-24. It declined to consider whether the Order's national-security rationale is a "facially legitimate and bona fide reason" under Kleindienst v. Mandel, 408 U.S. 753, 770 (1972). Add. 15. The court also declined to limit the injunction to Section 2(c)'s temporary suspension on entry for nationals of six countries. Add. 20-23. The court reasoned that "the entirety of the [Order] runs afoul of the Establishment Clause," and the "historical context and evidence relied on by the [c]ourt * * * does not parse between Section 2 and Section 6, nor * * * between subsections within Section 2." Add. 20-21. It declined to stay the injunction

pending appeal. Add. 23. The court again did not address respondents' other challenges to the Order. Add. 14 n.3.

5. The government promptly appealed the preliminary injunction and requested a stay and expedited briefing. A panel of the Ninth Circuit heard oral argument on May 15, 2017, but it has not yet ruled on the government's stay motion or on the merits.

6. Meanwhile, litigation over the January Order and the new Order has proceeded in other courts. In Washington, the Ninth Circuit sua sponte denied reconsideration en banc of the denial of a stay of an injunction against the January Order, over the dissent of five judges who issued three separate opinions. Amended Order, Washington v. Trump, No. 17-35105 (Mar. 17, 2017). Judge Bybee concluded that Mandel provides the governing "test for judging executive and congressional action [for] aliens who are outside our borders and seeking admission." Id., slip op. at 11 (Bybee, J., dissenting from denial of reconsideration en banc). Judge Kozinski concluded that using campaign and other unofficial statements made outside the process of "crafting an official policy" to establish "unconstitutional motives" is improper, "unworkable," and yields "absurd result[s]." Id., slip op. at 5-6 (Kozinski, J., dissenting from denial of reconsideration en banc) (Washington Kozinski Dissent).

On March 16, 2017, the United States District Court for the District of Maryland granted a preliminary injunction against only

Section 2(c) -- declining to enjoin other provisions, including Section 6's refugee provisions. IRAP v. Trump, No. 17-361, 2017 WL 1018235, at *18. The government appealed and sought a stay and expedited briefing. The Fourth Circuit sua sponte ordered initial en banc hearing, heard argument on May 8, and on May 25, it affirmed that injunction in principal part in a divided decision and denied a stay. IRAP v. Trump, No. 17-1351, 2017 WL 2273306 (May 25, 2017). The government is today filing a petition for a writ of certiorari to review that ruling and an application for a stay of the IRAP injunction pending disposition of the petition.

ARGUMENT

Under this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, this Court, or a single Justice, has authority to stay a district-court order pending appeal to a court of appeals.[6] "In considering stay applications on matters pending before the Court of Appeals, a Circuit Justice" considers three questions: first, he "must try to predict whether four Justices would vote to grant

---

[6] See, e.g., West Virginia v. EPA, 136 S. Ct. 1000 (2016); Ashcroft v. North Jersey Media Grp., Inc., 536 U.S. 954 (2002); INS v. Legalization Assistance Project, 510 U.S. 1301 (1993) (O'Connor, J., in chambers); United States Dep't of Def. v. Meinhold, 510 U.S. 939 (1993); United States Dep't of Commerce v. Assembly of Cal., 501 U.S. 1272 (1991); United States Dep't of Justice v. Rosenfeld, 501 U.S. 1227 (1991); Heckler v. Redbud Hosp. Dist., 473 U.S. 1308, 1314 (1985) (Rehnquist, J., in chambers); Heckler v. Lopez, 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers); Bureau of Econ. Analysis v. Long, 450 U.S. 975 (1981); Stephen M. Shapiro et al., Supreme Court Practice 881-884 (10th ed. 2013) (Shapiro).

certiorari" if the court below ultimately rules against the applicant; second, he must "try to predict whether the Court would then set the order aside"; and third, he must "balance the so-called stay equities," San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (internal quotation marks omitted), by "determin[ing] whether the injury asserted by the applicant outweighs the harm to other parties or to the public," Lucas v. Townsend, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); see Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (traditional stay factors). Here, as explained below, all of those factors counsel strongly in favor of a stay.

At a minimum, the injunction -- which bars enforcement of Sections 2 and 6 in their entirety, as to all persons worldwide -- is vastly overbroad and should be stayed to the extent it goes beyond remedying the alleged injury to respondent Dr. Elshikh. In addition, the Court may construe this application as a petition for a writ of certiorari before judgment and grant certiorari both in this case and in IRAP v. Trump, No. 17-1351, 2017 WL 2273306 (4th Cir. May 25, 2017) (en banc), see Nken v. Mukasey, 555 U.S. 1042 (2008) (treating stay application as petition for a writ of certiorari and granting petition); Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (per curiam) (same); Shapiro 418-419, while staying the injunction pending a final disposition.

1. If the Ninth Circuit affirms the injunction in whole or in part, this Court is likely to grant review. As explained at length in the stay application and the petition for a writ of certiorari in IRAP, the Fourth Circuit's decision in that case enjoining Section 2(c)'s temporary suspension presents exceptionally important questions of federal law. Appl. for Stay at 18-22, Trump v. IRAP, No. 16-A-___; Pet. at 33-34, Trump v. IRAP, No. 16-___ (IRAP Pet.). The en banc Fourth Circuit upheld an injunction setting aside Section 2(c) even though it was issued by the President at the height of his authority: it was expressly authorized by an Act of Congress that "implement[s] an inherent executive power" regarding the "admissibility of aliens," United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); see 8 U.S.C. 1182(f), 1185(a)(1). The Order also was informed by the advice of Cabinet officials responsible for national-security, immigration, foreign-relations, and legal matters, and it drew on prior steps by Congress and the Executive that identified the six countries as posing heightened terrorism risks.

This Court has granted review to address interference with Executive Branch conduct that is of "importance * * * to national security concerns," Department of the Navy v. Egan, 484 U.S. 518, 520 (1988), or with "federal power" over "the law of immigration and alien status," Arizona v. United States, 132 S. Ct. 2492, 2498 (2012). The IRAP injunction causes both types of interference.

IRAP Pet. 14-26, 33-34. A fortiori, if the injunction issued by the Hawaii court in this case is upheld by the Ninth Circuit, it also will warrant this Court's review. In addition to enjoining Section 2(c)'s temporary suspension of entry from six countries, the Hawaii injunction here bars enforcement of every other provision in Sections 2 and 6 -- which address admission of refugees and various purely internal governmental activities. Add. 23.[7] If this sweeping injunction is affirmed, this Court's review will plainly be appropriate.

2. A stay is also warranted because, if the Ninth Circuit affirms the injunction in this case, there is at least a "fair prospect" that this Court will vacate the injunction in whole or in part, Lucas, 486 U.S. at 1304, either because respondents' claims are not justiciable or because they fail on the merits. And as explained below, see pp. 37-40, infra, it is exceedingly likely that this Court would narrow the injunction, both because it enjoins provisions beyond Section 2(c) that do not even arguably cause respondents any cognizable injury and because they may not obtain global relief against implementation of Section 2(c).

---

[7] See Order §§ 2(a) and (b) (DHS must conduct worldwide review of screening procedures and prepare a report), 2(d) (Secretary of State must seek information from foreign governments), 2(e) and (f) (DHS will make recommendations), 2(g) (Secretaries of State and Homeland Security shall submit joint reports), 6(a) and (d) (internal review of refugee program application and adjudication procedures, and of coordination with state and local jurisdictions).

a. In their briefs to both the district court and court of appeals, respondents principally challenged Section 2(c), which temporarily pauses the entry of nationals from six countries that sponsor or shelter terrorism. For many of the reasons set forth in the government's petition for certiorari in IRAP (at 14-20), respondents' Establishment Clause claim is not justiciable.

i. "[T]he power to expel or exclude aliens" is "a fundamental sovereign attribute exercised by the Government's political departments" and "largely immune from judicial control." Fiallo v. Bell, 430 U.S. 787, 792 (1977). That well-established principle is manifested in "the doctrine of consular nonreviewability," under which the decision whether to issue a visa to an alien abroad "is not subject to judicial review * * * unless Congress says otherwise." Saavedra Bruno v. Albright, 197 F.3d 1153, 1156, 1159 (D.C. Cir. 1999); see id. at 1158-1160 (citing authorities); see also Brownell v. Tom We Shung, 352 U.S. 180, 184 n.3, 185 n.6 (1956).

Although this Court has twice permitted limited judicial review for certain constitutional claims, that exception permits only claims by a U.S. citizen that exclusion of an alien violates the citizen's own constitutional rights. See Kleindienst v. Mandel, 408 U.S. 753, 760, 762 (1972) (claim by U.S. citizens that exclusion of speaker violated citizens' own First Amendment rights); Kerry v. Din, 135 S. Ct. 2128, 2131 (2015) (opinion of

Scalia, J.) (claim by U.S. citizen that exclusion of her spouse implicated her own asserted constitutional rights); see also Saavedra Bruno, 197 F.3d at 1163-1164.

That narrow exception does not permit review of respondents' Establishment Clause challenge because Section 2(c)'s temporary suspension of entry for certain aliens abroad does not violate respondents' own rights under the Establishment Clause. Hawaii does not have rights of its own under that Clause that it could assert here, and this Court has held that Hawaii "does not have standing as parens patriae to bring an action against the Federal Government" to protect its residents from alleged discrimination. Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 610 n.16 (1982). Notably, the district court did not base Hawaii's putative standing on any injury linked to the State's own Establishment Clause rights. Rather, it relied on purported injuries to Hawaii's universities and tax revenue -- injuries that have nothing to do with religious freedoms. See C.A. E.R. 9-10, 41-45.

Dr. Elshikh similarly does not assert any cognizable violation of his own religious-freedom rights. Even if his mother-in-law's visa-application interview would be scheduled during the 90-day suspension and she were found otherwise eligible for a visa, she may well obtain a waiver under Section 3(c), which permits waivers for aliens from the six countries who "seek[] to enter the

United States to visit or reside with a close family member (e.g., a * * * parent) who is a United States citizen." Order § 3(c)(iv). Any such injury is therefore not ripe because it depends on "contingent future events that may not occur." Texas v. United States, 523 U.S. 296, 300 (1998) (citation omitted). In any event, if Dr. Elshikh's mother-in-law were ultimately denied a visa, that would not implicate Dr. Elshikh's rights under the Establishment Clause because it would not result from any alleged discrimination against him. See McGowan v. Maryland, 366 U.S. 420, 429-430 (1961); see also Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 15-18 & n.8 (2004); IRAP Pet. 16-17.

The district court held that Dr. Elshikh is injured because the Order's temporary exclusion of his mother-in-law and other Muslims sends a stigmatizing "message" disfavoring his religion. Add. 48 (citation omitted); see Add. 47-49. That purported injury fares no better. "[O]nly * * * 'those persons who are personally denied equal treatment' by * * * challenged discriminatory conduct" have suffered a violation of their own rights that confers standing to object to "the stigmatizing injury often caused by racial [or other invidious] discrimination." Allen v. Wright, 468 U.S. 737, 755 (1984) (citation omitted). Regardless of "the intensity" of a plaintiff's feelings of aggrievement, objecting to government action directed at others is not the type of "personal injury" that supports standing to sue, "even though the

disagreement is phrased in [Establishment Clause] terms." Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 485-486 (1982). A plaintiff suffers such injury for Establishment Clause purposes when he himself is "subjected to unwelcome religious exercises" or "forced to assume special burdens to avoid them." Id. at 486 n.22. Dr. Elshikh is not subject to Section 2(c); it applies only to aliens abroad.

The district court's contrary holding conflicts with In re Navy Chaplaincy, 534 F.3d 756 (D.C. Cir. 2008) (Kavanaugh, J.), cert. denied, 556 U.S. 1167 (2009). As the D.C. Circuit explained there, it would "eviscerate well-settled standing limitations" to allow a putative Establishment Clause plaintiff to "re-characterize[]" an abstract injury flowing from "government action" directed against others as a personal injury from "a governmental message [concerning] religion" directed at the plaintiff. Id. at 764. If that were permissible, the D.C. Circuit noted, the challengers in Valley Forge and other cases "could have obtained standing to sue simply by targeting not the government's action, but rather the government's alleged 'message' of religious preference communicated through that action." Ibid. The D.C. Circuit therefore held that the plaintiffs (Protestant chaplains in the Navy) could not challenge alleged discrimination against others (different Protestant chaplains) by claiming that it conveyed a pro-Catholic message to them. Id. at 762-765.

ii. Neither Hawaii nor Dr. Elshikh has identified any cognizable injury from the other provisions of the Order that the district court enjoined. Respondents suffer no injury from Section 6's provisions temporarily suspending entry of refugees and reducing the maximum number of refugees who may enter the United States in Fiscal Year 2017. Those refugee provisions have no effect on Hawaii's university system or its tourist revenues, and Dr. Elshikh's mother-in-law does not seek entry as a refugee. Indeed, respondents' briefing in support of a TRO never specifically cited the refugee cap and barely mentioned the other refugee provisions. See generally D. Ct. Doc. 65 (Mar. 8, 2017); D. Ct. Doc. 191 (Mar. 14, 2017).

Respondents also do not and cannot identify any cognizable injury from the other provisions of Sections 2 and 6 that address government agencies' internal and diplomatic activities. Reviews of vetting procedures and communications with other governments do not cause any conceivable injury to Hawaii or Dr. Elshikh. They lack standing to challenge those provisions.

b. Even if respondents' Establishment Clause challenge to the Order were justiciable, it lacks merit. The district court in this case held that Sections 2 and 6 of the Order likely violate the Establishment Clause for substantially the same reasons that the district court in IRAP enjoined Section 2(c): that even though the Order is facially neutral with respect to religion, certain

extrinsic material -- primarily campaign statements made by the President before taking office -- reflects an improper religious purpose. That conclusion is wrong as to Section 2(c), IRAP Pet. 20-31, and it is indefensible as to the other provisions of Sections 2 and 6 that the district court enjoined.[8]

i. Respondents' constitutional challenge to the exclusion of aliens abroad is governed by this Court's decision in Mandel, supra. Mandel held that "when the Executive exercises" its authority to exclude aliens from the country "on the basis of a facially legitimate and bona fide reason, the courts will neither

---

[8] The district court did not address (let alone base its injunction upon) respondents' due-process or statutory claims. Add. 14 n.3, 53 n.11. Respondents' due-process claim is not justiciable because the alleged delay in the entry of Dr. Elshikh's mother-in-law is speculative. See Gov't C.A. Br. 29. That claim also fails on the merits for two reasons. First, courts have not extended the due-process right from spousal relationships (where it is based on the fundamental right to marry) to in-law relationships. See Din, 135 S. Ct. at 2139 (Kennedy, J., concurring in the judgment) (assuming without deciding that a U.S. citizen has a cognizable liberty interest in her spouse's visa application); Gov't C.A. Reply Br. 27. Second, due process does not require notice or individualized hearings when the government acts through categorical judgments, see Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445-446 (1915), and in any event the Order's individualized waiver process satisfies any obligation the government might have to Dr. Elshikh. See Gov't C.A. Reply Br. 28. Respondents' statutory claim is barred by consular nonreviewability and in any event lacks merit. See id. at 10-11, 20-26. And as the district court in IRAP v. Trump, recognized, respondents' principal statutory argument would not even justify an injunction against Section 2(c)'s temporary entry suspension, but would affect only the issuance of immigrant visas. No. 17-361, 2017 WL 1018235, at *10 (D. Md. Mar. 16, 2017). It certainly would not support enjoining the remainder of Sections 2 and 6.

look behind the exercise of that discretion, nor test it by balancing its justification against the" asserted constitutional rights of U.S. citizens. 408 U.S. at 770. That test -- which lower courts have "equated" with "rational basis review," IRAP, 2017 WL 2273306, at *15 n.14 (collecting cases) -- reflects the Constitution's allocation of "exclusive[]" power over the exclusion of aliens to Congress and the Executive. Mandel, 408 U.S. at 765; see id. at 770 (rejecting First Amendment challenge by U.S. citizens to exclusion of alien because it rested on a "facially legitimate and bona fide reason").

The district court below erred at the threshold by refusing to apply Mandel and instead following Ninth Circuit precedent that it construed as deeming Mandel inapplicable to the "promulgation of sweeping immigration policy." Add. 16 (citation omitted). This Court, however, has applied Mandel to an Act of Congress that establishes broad immigration policy. Fiallo, 430 U.S. at 792-796 (applying Mandel in rejecting equal-protection challenge to statute governing admission of aliens). Even the Fourth Circuit in IRAP, disagreeing with the district court in that case, concluded that Mandel applies to the plaintiffs' challenges to the Order. 2017 WL 2273306, at *14.

Straightforward application of Mandel resolves this case. Section 2(c) is premised on a facially legitimate purpose: protecting national security. Order §§ 1(f), 2(c). And the Order

sets forth a bona fide factual basis for that justification: Congress or the Executive previously identified the six countries as presenting heightened terrorism-related risks, and conditions in each country "diminish[] the foreign government's willingness or ability to share or validate important information" needed to vet their nationals. Id. § 1(d); see id. § 1(e).

Respondents invited the district court to look behind the Order's stated justification, asserting that it was a "pretext" given in "bad faith." D. Ct. Doc. 191, at 20; see D. Ct. Doc. 65, at 29. But the Mandel Court explicitly held that the "bona fide" standard does not permit "look[ing] behind" the government's stated reason. 408 U.S. at 770. Rather, courts can ensure that the stated reason bears a rational relationship to the government's action -- i.e., that the reason is facially bona fide as well as legitimate. Indeed, the Court declined Justice Marshall's invitation in dissent to take "[e]ven the briefest peek behind the Attorney General's reason for refusing a waiver." Id. at 778. Respondents' approach cannot be squared with what Mandel said or what it did. See IRAP, 2017 WL 2273306, at *61 (Niemeyer, J., dissenting).

Respondents also misread a statement in Justice Kennedy's concurrence in Din, supra, to support rewriting Mandel's settled rule. D. Ct. Doc. 191, at 16-17. As explained in the certiorari petition in IRAP (at 23-26), the Din concurrence did not endorse

such a wide-ranging search for pretext. Rather, it posited a much narrower scenario: where a U.S. citizen plausibly alleges with particularity that a consular officer had no "bona fide factual basis" for denying a visa on a specific statutory ground (in Din, the applicant's ties to terrorism), and the visa denial implicates the citizen's own constitutional rights, due process may entitle the citizen to "additional factual details" about the consular officer's decision (provided the information is not classified). 135 S. Ct. at 2140, 2141.

That inquiry is inapposite here for two independent reasons. First, the statute authorizing the Order's suspension does not specify any particular factual predicates: the President need only determine that, in his judgment, entry "would be detrimental to the interests of the United States." 8 U.S.C. 1182(f). Second, the district court did not question that the terrorism-related grounds set forth in the Order provide an adequate factual basis for Section 2(c)'s temporary suspension of entry.

ii. Even if the district court could appropriately disregard Mandel, its conclusion that the Order is likely unconstitutional would still be incorrect. In assessing domestic measures under the Establishment Clause, courts focus on "the 'text, legislative history, and implementation of the statute.'" McCreary County v. ACLU of Ky., 545 U.S. 844, 862 (2005) (citation omitted). As the district court acknowledged, the Order "does not facially

discriminate for or against any particular religion" or religion in general. Add. 54. The Order is also religion-neutral in "operation." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993) (Lukumi). Section 2(c) draws distinctions among countries based on national-security risks identified by Congress and the Executive, not religion, and applies evenhandedly in the countries it covers.

The district court noted that the "six countries have overwhelmingly Muslim populations." Add. 55. But that does not establish that the suspension's object is to single out Islam. Those countries were previously identified by Congress and the Executive for reasons respondents do not contend were religiously motivated: each "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." Order § 1(d). Those countries represent a small fraction of the world's Muslim-majority countries and of the global Muslim population. And the suspension covers all nationals of those countries, including many non-Muslim individuals, who meet the Order's criteria. To regard the dominant religion of a country as evidence of an Establishment Clause violation could intrude on "every foreign policy decision made by the political branches." Washington Kozinski Dissent 3 n.2. Such measures often address particular nations with a dominant religion.

The other provisions of the Order the district court enjoined are also indisputably religion-neutral. Section 6's provisions temporarily suspending adjudication of applications and travel by aliens seeking refugee admission and reducing the maximum number of refugees who may be admitted this fiscal year apply to nationals of all countries worldwide. And the remaining provisions of Sections 2 and 6 concerning internal and diplomatic government activities have no connection to nationality or religion.

The district court reached its contrary conclusion -- that the Order's "stated secular purpose" is "secondary to a religious objective" -- based on certain extrinsic material, principally comments made by then-candidate Donald Trump and by campaign and presidential aides. Add. 60 (citation omitted); see Add. 54-60. That approach is fundamentally misguided. Divining the import of such statements for the President's action would entail the "judicial psychoanalysis of" an official's "heart of hearts" that this Court has rejected. McCreary, 545 U.S. at 862. Indeed, as far as the government is aware, until now no court has ever held that a provision of federal law neutral on its face and in operation violates the Establishment Clause based on speculation about its drafters' illicit purpose.

Courts should be especially reluctant to look to such extrinsic material to impeach a national-security and foreign-affairs judgment made by the President. The "presumption of

regularity" that attaches to all federal officials' actions, United States v. Chemical Found., Inc., 272 U.S. 1, 14 (1926), and the respect owed to a coordinate branch, apply with the utmost force to decisions made by the President himself. And when the Executive "disclose[s]" his "reasons for deeming nationals of a particular country a special threat," courts are "ill equipped to determine their authenticity and utterly unable to assess their adequacy." Reno v. American-Arab Anti-Discrim. Comm., 525 U.S. 471, 491 (1999).

Attempting to do so also would threaten impermissible intrusion on privileged internal Executive deliberations, see United States v. Nixon, 418 U.S. 683, 708 (1974), and carries the potential for litigant-driven discovery that would disrupt the President's execution of the laws, see Nixon v. Fitzgerald, 457 U.S. 731, 749-750 (1982). Litigants in other cases challenging the Order already have requested such discovery. The plaintiffs in Washington, for example, have sought nearly a year of discovery, including up to 30 depositions of White House staff and Cabinet officials. See Joint Status Report & Discovery Plan at 5-13, Washington v. Trump, No. 17-141 (W.D. Wash. Apr. 5, 2017) (ECF No. 177). This Court should reject a rule that invites probing the Chief Executive's actions in this manner. See Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 616-617 (2007) (Kennedy, J., concurring).

iii. At a minimum, the district court erred in relying on statements made during a political campaign. Statements made before the President took the prescribed oath of office to "preserve, protect and defend the Constitution," U.S. Const. Art. II, § 1, Cl. 8, and formed an Administration cannot provide a valid basis for discrediting the stated national-security purpose of subsequent, official action. Attempting to assess what campaign statements reveal about the motivation for later action would "mire [courts] in a swamp of unworkable litigation," forcing them to wrestle with intractable questions, including the level of generality at which a statement must be made, by whom, and how long after its utterance the statement remains probative. Washington Kozinski Dissent 5. That approach would inevitably devolve into the "judicial psychoanalysis" that McCreary repudiated. 545 U.S. at 862. And it "has no rational limit." IRAP, 2017 WL 2273306, at *64 (Niemeyer, J., dissenting).

Without campaign materials, the district court's analysis collapses. The district court cited only a handful of ambiguous and offhand, post-inauguration remarks by the President and aides, none of which exhibits a religious aim. Add. 18, 35-36, 59; see IRAP Pet. 30-31. Even under the domestic Establishment Clause precedent that the district court applied, those post-inauguration statements are not a sufficient basis for the court's conclusion

that the President -- acting on the recommendation of Members of his Cabinet -- acted pretextually and in bad faith.

3. a. A stay is also warranted because the injunction causes direct, irreparable injury to the interests of the government and the public (which merge here, Nken v. Holder, 556 U.S. 418, 435 (2009)). "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." Maryland v. King, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)) (brackets in original).

A fortiori, that principle applies here. The Executive represents the people of all 50 States, not just one. Enjoining Section 2's temporary entry suspension and Section 6's temporary refugee suspension -- which reflect a national-security judgment of the President and Cabinet-level officials -- threatens a harm far greater in magnitude than enjoining the state law-enforcement tool at issue in King. And enjoining provisions that direct government agencies to assess the adequacy of existing screening and vetting procedures, to review the Refugee Program, and to undertake other measures to enhance cooperation with other countries disables the government from taking action to protect the Nation.

The district court's ruling also improperly inserts the judiciary into sensitive matters of foreign affairs and risks "what [this] Court has called in another context 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'" Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J.) (quoting Baker v. Carr, 369 U.S. 186, 217, 226 (1962)). In his recent address to a gathering of Middle East leaders in Saudi Arabia, the President urged that the global fight against terrorism "is not a battle between different faiths, different sects, or different civilizations," but one "between barbaric criminals who seek to obliterate human life and decent people" of all religions who "want to protect life."[9] Although the President decried "the murder of innocent Muslims" by terrorist groups, and called for "tolerance and respect * * * no matter [one's] faith or ethnicity," May 21 Speech, the district court invalidated Sections 2 and 6 as rooted in "religious animus, invective, and obvious pretext," Add. 16. The district court's pronouncement -- that the President of the United States acted with animus toward one of the world's dominant religions, notwithstanding his public statements to the contrary -- plainly carries the potential to undermine the Executive's ability to conduct foreign relations for the Nation.

---

[9] President Trump's Full Speech from Saudi Arabia on Global Terrorism, Wash. Post, May 21, 2017, https://goo.gl/viJRg2 (May 21 Speech).

b. By contrast, respondents have failed to "demonstrate that irreparable injury is likely in the absence of an injunction." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). As discussed above, p. 24, supra, respondents have identified no injury they will suffer as a result of Section 6's refugee-related provisions or the provisions of Sections 2 and 6 concerning the government's internal and diplomatic activities. As to Section 2(c), respondents have not demonstrated any likely irreparable injury during its brief 90-day pause in entry. Even if Dr. Elshikh's mother-in-law would be found otherwise eligible for a visa and would not receive a waiver, the potential temporary delay in entry does not constitute irreparable harm to respondents.

The district court did not hold otherwise. Instead, it held that "irreparable harm may be presumed with the finding of a violation of the First Amendment." Add. 64. The only purported violation of Dr. Elshikh's First Amendment rights stems not from any delay in his mother-in-law's entry, but rather from his alleged condemnation injury, i.e., the harm he claims to have suffered from the alleged "message" disfavoring his religion. Add. 48 (citation omitted). As explained above, see pp. 22-23, supra, that injury is not cognizable at all, and so the basis for the court's irreparable-harm ruling evaporates. In any event, that claimed injury does not outweigh the governmental and public

interests that support allowing the Order to take effect. Balancing the respective interests, a stay is clearly warranted.

4. At a minimum, a stay is warranted because the injunction is overbroad in multiple respects. See United States Department of Def. v. Meinhold, 510 U.S. 939 (1993).

a. The district court's injunction impermissibly purports to enjoin the President himself. It has been settled for 150 years that courts generally "ha[ve] no jurisdiction * * * to enjoin the President in the performance of his official duties." Franklin v. Massachusetts, 505 U.S. 788, 802-803 (1992) (opinion of O'Connor, J.) (quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1867)); id. at 823-828 (Scalia, J., concurring in part and concurring in the judgment). Any injunction must be confined to run only against federal agencies and officials, as the Fourth Circuit acknowledged in IRAP. See 2017 WL 2273306, at *27.

b. The district court further erred by enjoining Section 2(c) on its face. Respondents have fallen far short of carrying their burden of "establish[ing] that no set of circumstances exists under which the [Order] would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). For example, it is clearly lawful as applied to foreign nationals with no immediate relatives in the country and no other significant connection to it; such aliens abroad have no First Amendment rights, and no person in the U.S. can claim that exclusion of such aliens violates the person's own

rights. The district court offered no basis for enjoining the Order's application to persons as to whom it is indisputably valid.

c. The injunction's broad sweep -- categorically enjoining Sections 2 and 6 -- also violates the well-settled rule that injunctive relief must be limited to redressing a plaintiff's own injuries stemming from a violation of his own rights. Article III requires that "[t]he remedy" sought "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." Lewis v. Casey, 518 U.S. 343, 357 (1996). Bedrock rules of equity independently support the same requirement that injunctions be no broader than "necessary to provide complete relief to the plaintiff[]." Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (citation omitted). This rule applies with even greater force to a preliminary injunction, an equitable tool designed merely to "preserve the relative positions of the parties until a trial on the merits can be held." University of Tex. v. Camenisch, 451 U.S. 390, 395 (1981). The district court's injunction violates this rule in two ways.

i. The court erred in enjoining all parts of Sections 2 and 6, without considering whether each part causes any cognizable injury to respondents. Various subsections of both Sections 2 and 6 immediately affect only the government itself. They direct federal agencies to examine current procedures, to make recommendations and update policies, and to initiate inter-

governmental diplomatic and official communications. Those provisions do not pose any injury to Hawaii or Dr. Elshikh. See p. 24, supra. In addition, Section 6's refugee provisions -- temporarily suspending the Refugee Program (Order § 6(a)) and adopting a lower annual limit on the number of refugees admitted (id. § 6(b)) -- cause no harm to respondents. See p. 24, supra. With no harm to redress, enjoining Section 6 and the internal and diplomatic provisions of Section 2 was unwarranted.

The district court reasoned that, "because the entirety of the Executive Order runs afoul of the Establishment Clause," it had "no basis to narrow" injunctive relief to provisions that affect respondents. Add. 21. That conflates the scope of the purported legal defect in the Order with the extent of respondents' alleged injury that an injunction would address. The court cited Lukumi, supra, see Add. 21, but that case only confirms that the court was required to trace harms from each provision to respondents as a predicate for injunctive relief. The Court in Lukumi enjoined the city ordinances at issue because each element of the ordinances caused harm to church members' religious exercise. 508 U.S. at 535. The opposite is true here; most of Section 2 of the Order and all of Section 6 have no bearing on any cognizable harms to respondents.[10]

---

[10] The district court also asserted that the government failed to "provide a workable framework for narrowing [the injunction's] scope" to exclude provisions concerning internal and diplomatic activities. Add. 22. But it did not address the government's

ii. The district court separately erred by enjoining Sections 2 and 6 as to all persons worldwide, rather than limiting the injunction to those persons whose entry is allegedly necessary to redress any concrete, individualized, and cognizable injuries to respondents. The district court held that Dr. Elshikh has standing to challenge the Order based on the alleged message it supposedly sends. Add. 11, 47-49. But this Court has never permitted a plaintiff to reframe government conduct directed at aliens abroad as government speech directed at U.S. citizens in order to obtain an injunction -- much less a global injunction -- against the unwanted message. Even assuming that the possible delay in Dr. Elshikh's mother-in-law's ability to travel to Hawaii were a cognizable, irreparable injury, it would be fully redressed by enjoining the Order's application to her. At a minimum, as the Court did in Meinhold, it should limit the injunction to Dr. Elshikh's mother-in-law while the injunction's validity and scope are adjudicated. 510 U.S. at 939.

The district court suggested that the importance of uniform immigration law compels nationwide relief. Add. 44-45. Limiting any injunctive relief to Dr. Elshikh's mother-in-law would pose no genuine threat to uniformity. Respect for uniformity requires leaving the Order's global policy in place, with individualized

---

detailed explanation why each subsection at issue besides Section 2(c) concerns only internal or diplomatic matters and does not harm respondents. D. Ct. Doc. 251, at 4-7, 25-27 (Mar. 24, 2017).

exceptions for any respondents who have established irreparable injury from a violation of their own rights. The Order's severability clause compels the same conclusion. Order § 15 (If "the application of any provision [of the Order] to any person or circumstance[] is held to be invalid, * * * the application of [the Order's] other provisions to any other persons or circumstances shall not be affected."). Tailored relief would pose much less interference than enjoining the Order nationwide based on the injuries of only one individual.

CONCLUSION

The injunction should be stayed in its entirety pending the disposition of the appeal in the Ninth Circuit and, if that court affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. At a minimum, the injunction should be stayed as to all persons other than Dr. Elshikh's mother-in-law. In addition, the Court may construe this application as a petition for a writ of certiorari before judgment and grant the petition along with the petition for a writ of certiorari in IRAP, while staying the injunction pending a final disposition.

Respectfully submitted.

Jeffrey B. Wall /CWS

JEFFREY B. WALL
Acting Solicitor General

JUNE 2017

ADDENDUM

District Court Order Granting Motion to Convert Temporary Restraining Order to a Preliminary Injunction (D. Haw. Mar. 29, 2017) 1

District Court Order Granting Motion for Temporary Restraining Order (D. Haw. Mar. 15, 2017) 25

Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).....68

Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) 74

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAI'I and ISMAIL ELSHIKH, Plaintiffs, vs. DONALD J. TRUMP, *et al.*, Defendants.	CV. NO. 17-00050 DKW-KSC **ORDER GRANTING MOTION TO CONVERT TEMPORARY RESTRAINING ORDER TO A PRELIMINARY INJUNCTION**

INTRODUCTION

On March 15, 2017, the Court temporarily enjoined Sections 2 and 6 of Executive Order No. 13,780, entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 13209 (Mar. 6, 2017). *See* Order Granting Mot. for TRO, ECF No. 219 [hereinafter TRO]. Plaintiffs State of Hawai'i and Ismail Elshikh, Ph.D., now move to convert the TRO to a preliminary injunction. *See* Pls.' Mot. to Convert TRO to Prelim. Inj., ECF No. 238 [hereinafter Motion].

Upon consideration of the parties' submissions, and following a hearing on March 29, 2017, the Court concludes that, on the record before it, Plaintiffs have met

their burden of establishing a strong likelihood of success on the merits of their Establishment Clause claim, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of granting the requested relief. Accordingly, Plaintiffs' Motion (ECF No. 238) is GRANTED.

BACKGROUND

The Court briefly recounts the factual and procedural background relevant to Plaintiffs' Motion. A fuller recitation of the facts is set forth in the Court's TRO. *See* TRO 3–14, ECF No. 219.

I. The President's Executive Orders

A. Executive Order No. 13,769

On January 27, 2017, the President of the United States issued Executive Order No. 13,769 entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Jan. 27, 2017).[1] On March 6, 2017, the

---

[1]On February 3, 2017, the State filed its complaint and an initial motion for TRO, which sought to enjoin Sections 3(c), 5(a)–(c), and 5(e) of Executive Order No. 13,769. Pls.' Mot. for TRO, Feb. 3, 2017, ECF No. 2. The Court stayed the case (*see* ECF Nos. 27 & 32) after the United States District Court for the Western District of Washington entered a nationwide preliminary injunction enjoining the Government from enforcing the same provisions of Executive Order No. 13,769 targeted by the State. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 4, 2017, the Government filed an emergency motion in the United States Court of Appeals for the Ninth Circuit seeking a stay of the *Washington* TRO, pending appeal. That emergency motion was denied on February 9, 2017. *See Washington v. Trump*, 847 F.3d 1151 (9th Cir.) (per curium), *denying reconsideration en banc*, — F.3d —, 2017

President issued another Executive Order, No. 13,780, identically entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Executive Order"), 82 Fed. Reg. 13209. Like its predecessor, the Executive Order restricts the entry of foreign nationals from specified countries and suspends the United States refugee program for specified periods of time.

B. Executive Order No. 13,780

Section 1 of the Executive Order declares that its purpose is to "protect [United States] citizens from terrorist attacks, including those committed by foreign nationals." By its terms, the Executive Order also represents a response to the Ninth Circuit's per curiam decision in *Washington v. Trump*, 847 F.3d 1151. According to the Government, it "clarifies and narrows the scope of Executive action regarding immigration, extinguishes the need for emergent consideration, and eliminates the potential constitutional concerns identified by the Ninth Circuit." Notice of Filing of Executive Order 4–5, ECF No. 56.

Section 2 suspends from "entry into the United States" for a period of 90 days, certain nationals of six countries referred to in Section 217(a)(12) of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*: Iran, Libya, Somalia,

---

WL 992527 (9th Cir. 2017). On March 8, 2017, the Ninth Circuit granted the Government's unopposed motion to voluntarily dismiss the appeal. *See* Order, Case No. 17-35105 (9th Cir. Mar. 8, 2017), ECF No. 187.

Sudan, Syria, and Yemen. 8 U.S.C. § 1187(a)(12); Exec. Order § 2(c). The suspension of entry applies to nationals of these six countries who (1) are outside the United States on the new Executive Order's effective date of March 16, 2017; (2) do not have a valid visa on that date; and (3) did not have a valid visa as of 5:00 p.m. Eastern Standard Time on January 27, 2017 (the date of Executive Order No. 13,769). Exec. Order § 3(a). The 90-day suspension does not apply to: (1) lawful permanent residents; (2) any foreign national admitted to or paroled into the United States on or after the Executive Order's effective date (March 16, 2017); (3) any individual who has a document other than a visa, valid on the effective date of the Executive Order or issued anytime thereafter, that permits travel to the United States, such as an advance parole document; (4) any dual national traveling on a passport not issued by one of the six listed countries; (5) any foreign national traveling on a diplomatic-type or other specified visa; and (6) any foreign national who has been granted asylum, any refugee already admitted to the United States, or any individual granted withholding of removal, advance parole, or protection under the Convention Against Torture. *See* Exec. Order § 3(b). Under Section 3(c)'s waiver provision, foreign nationals of the six countries who are subject to the suspension of entry may nonetheless seek entry on a case-by-case basis.

Section 6 of the Executive Order suspends the U.S. Refugee Admissions Program for 120 days. The suspension applies both to travel into the United States and to decisions on applications for refugee status. *See* Exec. Order § 6(a). It excludes refugee applicants who were formally scheduled for transit by the Department of State before the March 16, 2017 effective date. Like the 90-day suspension, the 120-day suspension includes a waiver provision that allows the Secretaries of State and Homeland Security to admit refugee applicants on a case-by-case basis. *See* Exec. Order § 6(c). Unlike Executive Order No. 13,769, the new Executive Order does not expressly refer to an individual's status as a "religious minority" or refer to any particular religion, and it does not include a Syria-specific ban on refugees.

II. Plaintiffs' Claims

Plaintiffs filed a Second Amended Complaint for Declaratory and Injunctive Relief ("SAC") on March 8, 2017 (ECF No. 64) simultaneous with their Motion for TRO (ECF No. 65). The State asserts that the Executive Order inflicts constitutional and statutory injuries upon its residents, employers, and educational institutions, while Dr. Elshikh alleges injuries on behalf of himself, his family, and members of his Mosque. SAC ¶ 1.

According to Plaintiffs, the Executive Order results in "their having to live in a country and in a State where there is the perception that the Government has established a disfavored religion." SAC ¶ 5. Plaintiffs assert that by singling out nationals from the six predominantly Muslim countries, the Executive Order causes harm by stigmatizing not only immigrants and refugees, but also Muslim citizens of the United States. Plaintiffs point to public statements by the President and his advisors regarding the implementation of a "Muslim ban," which Plaintiffs contend is the tacit and illegitimate motivation underlying the Executive Order. *See* SAC ¶¶ 35–60. Plaintiffs argue that, in light of these and similar statements "where the President himself has repeatedly and publicly espoused an improper motive for his actions, the President's action must be invalidated." Pls.' Mem. in Supp. of Mot. for TRO 2, ECF No. 65-1. Plaintiffs additionally present evidence that they contend undermines the purported national security rationale for the Executive Order and demonstrates the Administration's pretextual justification for the Executive Order. *E.g.*, SAC ¶ 61 (citing Draft DHS Report, SAC, Ex. 10, ECF No. 64-10).

III. March 15, 2017 TRO

The Court's nationwide TRO (ECF No. 219) temporarily enjoined Sections 2 and 6 of the Executive Order, based on the Court's preliminary finding that Plaintiffs

demonstrated a sufficient likelihood of succeeding on their claim that the Executive Order violates the Establishment Clause. *See* TRO 41–42. The Court concluded, based upon the showing of constitutional injury and irreparable harm, the balance of equities, and public interest, that Plaintiffs met their burden in seeking a TRO, and directed the parties to submit a stipulated briefing and preliminary injunction hearing schedule. *See* TRO 42–43.

On March 21, 2017, Plaintiffs filed the instant Motion (ECF No. 238) seeking to convert the TRO to a preliminary injunction prohibiting Defendants from enforcing and implementing Sections 2 and 6 of the Executive Order until the matter is fully decided on the merits. They argue that both of these sections are unlawful in all of their applications and that both provisions are motivated by anti-Muslim animus. Defendants oppose the Motion. *See* Govt. Mem. in Opp'n to Mot. to Convert TRO to Prelim. Inj., ECF No. 251. After full briefing and notice to the parties, the Court held a hearing on the Motion on March 29, 2017.

DISCUSSION

The Court's TRO details why Plaintiffs are entitled to preliminary injunctive relief. *See* TRO 15–43. The Court reaffirms and incorporates those findings and conclusions here, and addresses the parties' additional arguments on Plaintiffs' Motion to Convert.

I. Plaintiffs Have Demonstrated Standing At This Preliminary Phase

The Court previously found that Plaintiffs satisfied Article III standing requirements at this preliminary stage of the litigation. *See* TRO 15–21 (State), 22–25 (Dr. Elshikh). The Court renews that conclusion here.

A. Article III Standing

Article III, Section 2 of the Constitution permits federal courts to consider only "cases" and "controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

"At this very preliminary stage of the litigation, the [Plaintiffs] may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their TRO motion to meet their burden." *Washington*, 847 F.3d at 1159 (citing *Lujan*, 504 U.S. at 561). "With these allegations and evidence, the [Plaintiffs] must make a 'clear showing of each element of standing.'" *Id.* (quoting

Townley v. Miller, 722 F.3d 1128, 1133 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 907 (2014)). On the record presented at this preliminary stage of the proceedings, Plaintiffs meet the threshold Article III standing requirements.

B. The State Has Standing

For the reasons stated in the TRO, the State has standing based upon injuries to its proprietary interests. *See* TRO 16–21.[2]

The State sufficiently identified monetary and intangible injuries to the University of Hawaii. *See, e.g.*, Suppl. Decl. of Risa E. Dickson, Mot. for TRO, Ex. D-1, ECF No. 66-6; Original Dickson Decl., Mot. for TRO, Ex. D-2, ECF No. 66-7. The Court previously found these types of injuries to be nearly indistinguishable from those found sufficient to confer standing according to the Ninth Circuit's *Washington* decision. *See* 847 F.3d at 1161 ("The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be

---

[2]The Court once again does not reach the State's alternative standing theory based on protecting the interests of its citizens as *parens patriae*. *See Washington*, 847 F.3d at 1168 n.5 ("The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States' proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.").

permitted to return if they leave. And we have no difficulty concluding that the States' injuries would be redressed if they could obtain the relief they ask for: a declaration that the Executive Order violates the Constitution and an injunction barring its enforcement."). The State also presented evidence of injury to its tourism industry. *See, e.g.*, SAC ¶ 100; Suppl. Decl. of Luis P. Salaveria, Mot. for TRO, Ex. C-1, ECF No. 66-4; Suppl. Decl. of George Szigeti, ¶¶ 5–8, Mot. for TRO, Ex. B-1, ECF No. 66-2.

For purposes of the instant Motion, the Court concludes that the State has preliminarily demonstrated that: (1) its universities will suffer monetary damages and intangible harms; (2) the State's economy is likely to suffer a loss of revenue due to a decline in tourism; (3) such harms can be sufficiently linked to the Executive Order; and (4) the State would not suffer the harms to its proprietary interests in the absence of implementation of the Executive Order. *See* TRO 21. These preliminary findings apply to each of the challenged Sections of the Executive Order. Accordingly, at this early stage of the litigation, the State has satisfied the requirements of Article III standing.

C. **Dr. Elshikh Has Standing**

Dr. Elshikh likewise has met his preliminary burden to establish standing to assert an Establishment Clause violation. *See* TRO 22–25. "The standing

question, in plain English, is whether adherents to a religion have standing to challenge an official condemnation by their government of their religious views[.] Their 'personal stake' assures the 'concrete adverseness' required." *See Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048–49 (9th Cir. 2010) (en banc). Dr. Elshikh attests that the effects of the Executive Order are "devastating to me, my wife and children." Elshikh Decl. ¶ 6, Mot. for TRO, Ex. A, ECF No. 66-1; *see also id.* ¶¶ 1, 3 ("I am deeply saddened . . . . by the message that both [Executive Orders] convey—that a broad travel-ban is 'needed' to prevent people from certain Muslim countries from entering the United States."); SAC ¶ 90 ("Muslims in the Hawai'i Islamic community feel that the new Executive Order targets Muslim citizens because of their religious views and national origin. Dr. Elshikh believes that, as a result of the new Executive Order, he and members of the Mosque will not be able to associate as freely with those of other faiths."). The alleged injuries are sufficiently personal, concrete, particularized, and actual to confer standing in the Establishment Clause context. *E.g.*, SAC ¶¶ 88–90; Elshikh Decl. ¶¶ 1, 3. These injuries have already occurred and will continue to occur if the Executive Order is implemented and enforced; the injuries are neither contingent nor speculative.

The final two aspects of Article III standing—causation and redressability—are also satisfied with respect to each of the Executive Order's challenged Sections. Dr. Elshikh's injuries are traceable to the new Executive Order and, if Plaintiffs prevail, a decision enjoining portions of the Executive Order would redress that injury. *See Catholic League*, 624 F.3d at 1053. At this preliminary stage of the litigation, Dr. Elshikh has accordingly carried his burden to establish standing under Article III.

The Court turns to the factors for granting preliminary injunctive relief.

II. Legal Standard: Preliminary Injunctive Relief

The underlying purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm. *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974); *see also Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130–31 (9th Cir. 2006).

The Court applies the same standard for issuing a preliminary injunction as it did when considering Plaintiffs' Motion for TRO. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the

balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citation omitted).

The Court, in its discretion, may convert a temporary restraining order into a preliminary injunction. *See, e.g.*, *ABX Air, Inc. v. Int'l Bhd. of Teamsters*, No. 1:16-CV-1096, 2016 WL 7117388, at *5 (S.D. Ohio Dec. 7, 2016) (granting motion to convert TRO into a preliminary injunction because "Defendants fail to allege any material fact suggesting that, if a hearing were held, this Court would reach a different outcome"; "[n]othing has occurred to alter the analysis in the Court's original TRO, and since this Court has already complied with the requirements for the issuance of a preliminary injunction, it can simply convert the nature of its existing Order."); *Productive People, LLC v. Ives Design*, No. CV-09-1080-PHX-GMS, 2009 WL 1749751, at *3 (D. Ariz. June 18, 2009) ("Because Defendants have given the Court no reason to alter the conclusions provided in its previous Order [granting a TRO], and because '[t]he standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction,' the Court will enter a preliminary injunction." (quoting *Brown Jordan Int'l, Inc. v. Mind's Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Haw. 2002))). Here, the parties were afforded notice, a full-briefing on the

merits, and a hearing both prior to entry of the original TRO and prior to consideration of the instant Motion.

For the reasons that follow and as set forth more fully in the Court's TRO, Plaintiffs have met their burden here.

III. Analysis of Factors: Likelihood of Success on the Merits

The Court's prior finding that Plaintiffs sufficiently established a likelihood of success on the merits of their Count I claim that the Executive Order violates the Establishment Clause remains undisturbed. *See* TRO 30–40.[3]

A. Establishment Clause

Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971), provides the benchmark for evaluating whether governmental action is consistent with or at odds with the Establishment Clause. According to *Lemon*, government action (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. *Id.* "Failure to satisfy any one of the three prongs of the *Lemon* test is sufficient to invalidate the challenged law or practice." *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1076–77 (9th Cir. 2010).

---

[3]The Court again expresses no view on Plaintiffs' additional statutory or constitutional claims.

The Court determined in its TRO that the preliminary evidence demonstrates the Executive Order's failure to satisfy *Lemon*'s first test. *See* TRO 33–36. The Court will not repeat that discussion here. As no *new* evidence contradicting the purpose identified by the Court has been submitted by the parties since the issuance of the March 15, 2017 TRO, there is no reason to disturb the Court's prior determination.

Instead, the Federal Defendants take a different tack. They once more urge the Court not to look beyond the four corners of the Executive Order. According to the Government, the Court must afford the President deference in the national security context and should not "'look behind the exercise of [the President's] discretion' taken 'on the basis of a facially legitimate and bona fide reason.'" Govt. Mem. in Opp'n to Mot. for TRO 42–43 (quoting *Kliendienst v. Mandel*, 408 U.S. 753, 770 (1972)), ECF No. 145. No binding authority, however, has decreed that Establishment Clause jurisprudence ends at the Executive's door. In fact, *every court* that has considered whether to apply the Establishment Clause to either the Executive Order or its predecessor (regardless of the ultimate outcome) has done so.[4] Significantly, this Court is constrained by the binding precedent and guidance

---

[4] *See Sarsour v. Trump*, No. 1:17-cv-00120 AJT-IDD, 2017 WL 1113305, at *11 (E.D. Va. Mar. 27, 2017) ("[T]he Court rejects the Defendants' position that since President Trump has offered a legitimate, rational, and non-discriminatory purpose stated in EO-2, this Court must confine its

offered in *Washington*. There, citing *Lemon*, the Ninth Circuit clearly indicated that the Executive Order is subject to the very type of secular purpose review conducted by this Court in considering the TRO. *Washington*, 847 F.3d at 1167–68; *id.* at 1162 (stating that *Mandel* does not apply to the "promulgation of sweeping immigration policy" at the "highest levels of the political branches").

The Federal Defendants' arguments, advanced from the very inception of this action, make sense from this perspective—where the "historical context and 'the specific sequence of events leading up to'" the adoption of the challenged Executive Order are as full of religious animus, invective, and obvious pretext as is the record here, it is no wonder that the Government urges the Court to altogether ignore that history and context. *See McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). The Court, however, declines to do so. *Washington*, 847

---

analysis of the constitutional validity of EO-2 to the four corners of the Order.") (citations omitted); *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 1018235, at *16 (D. Md. Mar. 16, 2017) ("Defendants argue that because the Establishment Clause claim implicates Congress's plenary power over immigration as delegated to the President, the Court need only consider whether the Government has offered a 'facially legitimate and bona fide reason' for its action. *Mandel*, 408 U.S. at 777 .... [A]lthough '[t]he Executive has broad discretion over the admission and exclusion of aliens,' that discretion 'may not transgress constitutional limitations,' and it is 'the duty of the courts' to 'say where those statutory and constitutional boundaries lie.' *Abourezk[v. Reagan]*, 785 F.2d [1043,] 1061 [(D.C. Cir. 1986)]."); *Aziz v. Trump*, No. 1:17-CV-116 LMB-TCB, 2017 WL 580855, at *8 (E.D. Va. Feb. 13, 2017) ("Moreover, even if Mandel[, 408 U.S. at 770,] did apply, it requires that the proffered executive reason be 'bona fide.' As the Second and Ninth Circuits have persuasively held, if the proffered 'facially legitimate' reason has been given in 'bad faith,' it is not 'bona fide.' *Am. Academy of Religion v. Napolitano*, 573 F.3d 115, 126 (2d Cir. 2009); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008). That leaves the Court in the same position as in an ordinary secular purpose case: determining whether the proffered reason for the EO is the real reason.")).

F.3d at 1167 ("It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims."). The Court will not crawl into a corner, pull the shutters closed, and pretend it has not seen what it has.[5] The Supreme Court and this Circuit both dictate otherwise, and that is the law this Court is bound to follow.

B. Future Executive Action

The Court's preliminary determination does not foreclose future Executive action. The Court recognizes that it is not the case that the Administration's past conduct must forever taint any effort by it to address the security concerns of the nation. *See* TRO 38–39. Based upon the preliminary record available, however, one cannot conclude that the actions taken during the interval between revoked Executive Order No. 13,769 and the new Executive Order represent "*genuine* changes in constitutionally significant conditions." *McCreary*, 545 U.S. at 874 (emphasis added).

The Government emphasizes that "the Executive Branch revised the new Executive Order to avoid any Establishment Clause concerns," and, in particular,

---

[5] *See Int'l Refugee Assistance Project*, 2017 WL 1018235, at *14 ("Defendants have cited no authority concluding that a court assessing purpose under the Establishment Clause may consider only statements made by government employees at the time that they were government employees. Simply because a decisionmaker made the statements during a campaign does not wipe them from the 'reasonable memory' of a 'reasonable observer.'" (quoting *McCreary*, 545 U.S. at 866)).

removed the preference for religious minorities provided in Executive Order No. 13,769. Mem. in Opp'n 21, ECF No. 251. These efforts, however, appear to be precisely what Plaintiffs characterize them to be: efforts to "sanitize [Executive Order No. 13,769's] refugee provision in order to 'be responsive to a lot of very technical issues that were brought up by the court.'" Mem. in Supp. of Mot. to Convert TRO to Prelim. Inj. 20, ECF No. 238-1 [hereinafter PI Mem.] (quoting SAC ¶ 74(a)). Plaintiffs also direct the Court to the President's March 15, 2017 description of the Executive Order as "a watered-down version of the first one." PI Mem. 20 (citing Katyal Decl. 7, Ex. A, ECF No. 239-1). "[A]n implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense." *McCreary*, 545 U.S. at 874.

IV. Analysis of Factors: Irreparable Harm

Irreparable harm may be *presumed* with the finding of a violation of the First Amendment. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))). Because Dr. Elshikh is likely to succeed on the merits of his Establishment Clause claim, the Court finds that the second factor of the *Winter* test is satisfied—that Dr. Elshikh is likely to suffer irreparable, ongoing, and significant

injury in the absence of a preliminary injunction. *See* TRO 40 (citing SAC ¶¶ 88–90; Elshikh Decl. ¶¶ 1, 3).

V. Analysis of Factors: Balance of Equities And Public Interest

The final step in determining whether to grant Plaintiffs' Motion is to assess the balance of equities and examine the general public interests that will be affected. The Court acknowledges Defendants' position that the Executive Order is intended "to protect the Nation from terrorist activities by foreign nationals admitted to the United States[.]" Exec. Order, preamble. National security is unquestionably of vital importance to the public interest. The same is true with respect to affording appropriate deference to the President's constitutional and statutory responsibilities to set immigration policy and provide for the national defense. Upon careful consideration of the totality of the circumstances, however, the Court reaffirms its prior finding that the balance of equities and public interest weigh in favor of maintaining the status quo. As discussed above and in the TRO, Plaintiffs have shown a strong likelihood of succeeding on their claim that the Executive Order violates First Amendment rights under the Constitution. *See* TRO 41–42; *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is *always* in the public interest to prevent the violation of a party's constitutional rights." (emphasis added) (citing *Elrod*, 427 U.S. at 373)).

VI. Scope of Preliminary Injunction: Sections 2 And 6

Having considered the constitutional injuries and harms discussed above, the balance of equities, and public interest, the Court hereby grants Plaintiffs' request to convert the existing TRO into a preliminary injunction. The requested nationwide relief is appropriate in light of the likelihood of success on Plaintiffs' Establishment Clause claim. *See, e.g., Texas v. U.S.*, 809 F.3d 134, 188 (5th Cir. 2015) ("[Because] the Constitution vests [district courts] with 'the judicial Power of the United States' . . . , [i]t is not beyond the power of the court, in appropriate circumstances, to issue a nationwide injunction." (citing U.S. Const. art. III, § 1)), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016); *see also Washington*, 847 F.3d at 1167 ("Moreover, even if limiting the geographic scope of the injunction would be desirable, the Government has not proposed a workable alternative form of the TRO that accounts for the nation's multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States' borders.").

The Government insists that the Court, at minimum, limit any preliminary injunction to Section 2(c) of the Executive Order. It makes little sense to do so. That is because the entirety of the Executive Order runs afoul of the Establishment Clause where "openly available data support[] a commonsense conclusion that a

religious objective permeated the government's action," and not merely the promulgation of Section 2(c). *McCreary*, 545 U.S. at 863; *see* SAC ¶¶ 36–38, 58, 107; TRO 16, 24–25, 42. Put another way, the historical context and evidence relied on by the Court, highlighted by the comments of the Executive and his surrogates, does not parse between Section 2 and Section 6, nor does it do so between subsections within Section 2. Accordingly, there is no basis to narrow the Court's ruling in the manner requested by the Federal Defendants.[6] *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 539–40 (1993) ("[It would be] implausible to suggest that [Section 2(c)] but not the [other Sections] had as [its] object the suppression of [or discrimination against a] religion. . . . We need not decide whether the Ordinance 87–72 could survive constitutional scrutiny if it existed separately; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship.").

---

[6]Plaintiffs further note that the Executive Order "bans refugees at a time when the publicized refugee crisis is focused on Muslim-majority nations." Reply in Supp. of Mot. to Convert TRO to Prelim. Inj. 14. Indeed, according to Pew Research Center analysis of data from the State Department's Refugee Processing Center, a total of 38,901 Muslim refugees entered the United States in fiscal year 2016, accounting for nearly half of the almost 85,000 refugees who entered the country during that period. *See* Br. of Chicago, Los Angeles, New York, Philadelphia, & Other Major Cities & Counties as Amici Curiae in Supp. of Pls.' Mot. to Convert TRO to Prelim. Inj. 12, ECF No. 271-1 (citing Phillip Connor, *U.S. Admits Record Number of Muslim Refugees in 2016*, Pew Research Center (Oct. 5, 2016), http://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-ofmuslim-refugees-in-2016). "That means the U.S. has admitted the highest number of Muslim refugees of any year since date of self-reported religious affiliations first became publicly available in 2002." *Id.*

The Court is cognizant of the difficult position in which this ruling might place government employees performing what the Federal Defendants refer to as "inward-facing" tasks of the Executive Order. Any confusion, however, is due in part to the Government's failure to provide a workable framework for narrowing the scope of the enjoined conduct by specifically identifying those portions of the Executive Order that are in conflict with what it merely argues are "internal governmental communications and activities, most if not all of which could take place in the absence of the Executive Order but the status of which is now, at the very least, unclear in view of the current TRO." Mem. in Opp'n 29. The Court simply cannot discern, on the present record, a method for determining which enjoined provisions of the Executive Order are causing the alleged confusion asserted by the Government. *See, e.g.*, Mem. in Opp'n 28 ("[A]n internal review of procedures obviously can take place independently of the 90-day suspension-of-entry provision (though doing so would place additional burdens on the Executive Branch, which is one of the several reasons for the 90-day suspension (citing Exec. Order No. 13,780, § 2(c)). Without more, "even if the [preliminary injunction] might be overbroad in some respects, it is not our role to try, in effect, to rewrite the Executive Order." *Washington*, 847 F.3d at 1167.

CONCLUSION

Based on the foregoing, Plaintiffs' Motion to Convert Temporary Restraining Order to A Preliminary Injunction is hereby GRANTED.

PRELIMINARY INJUNCTION

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).

The Court declines to stay this ruling or hold it in abeyance should an appeal of this order be filed.

IT IS SO ORDERED.

Dated: March 29, 2017 at Honolulu, Hawai'i.

Derrick K. Watson
United States District Judge

FILED IN THE UNITED STATES DISTRICT C DISTRICT OF HAWAII 12:32 pm, Mar 15, 2 SUE BEITIA, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAI'I and ISMAIL ELSHIKH, Plaintiffs, vs. DONALD J. TRUMP, *et al.*, Defendants.	CV. NO. 17-00050 DKW-KSC **ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER**

INTRODUCTION

On January 27, 2017, the President of the United States issued Executive Order No. 13,769 entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States." *See* 82 Fed. Reg. 8977 (Jan. 27, 2017). On March 6, 2017, the President issued another Executive Order, No. 13,780, identically entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States." (the "Executive Order"). *See* 82 Fed. Reg. 13209 (Mar. 6, 2017). The Executive Order

revokes Executive Order No. 13,769 upon taking effect.[1] Exec. Order §§ 13, 14. Like its predecessor, the Executive Order restricts the entry of foreign nationals from specified countries and suspends entrants from the United States refugee program for specified periods of time.

Plaintiffs State of Hawai'i ("State") and Ismail Elshikh, Ph.D. seek a nationwide temporary restraining order that would prohibit the Federal Defendants[2] from "enforcing or implementing Sections 2 and 6 of the Executive Order" before it takes effect. Pls.' Mot. for TRO 4, Mar. 8, 2017, ECF No. 65.[3] Upon evaluation of the parties' submissions, and following a hearing on March 15, 2017, the Court concludes that, on the record before it, Plaintiffs have met their burden of establishing a strong likelihood of success on the merits of their Establishment Clause claim, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of granting the requested relief. Accordingly, Plaintiffs' Motion for TRO (ECF. No. 65) is granted for the reasons detailed below.

---

[1]By its terms, the Executive Order becomes effective as of March 16, 2017 at 12:01 a.m., Eastern Daylight Time—*i.e.*, March 15, 2017 at 6:01 p.m. Hawaii Time. Exec. Order § 14.

[2]Defendants in the instant action are: Donald J. Trump, in his official capacity as President of the United States; the U.S. Department of Homeland Security ("DHS"); John F. Kelly, in his official capacity as Secretary of DHS; the U.S. Department of State; Rex Tillerson, in his official capacity as Secretary of State; and the United States of America.

[3]Plaintiffs filed a Second Amended Complaint for Declaratory and Injunctive Relief ("SAC") on March 8, 2017 simultaneous with their Motion for TRO. SAC, ECF. No. 64.

BACKGROUND

I. The President's Executive Orders

A. Executive Order No. 13,769

Executive Order No. 13,769 became effective upon signing on January 27, 2017. *See* 82 Fed. Reg. 8977. It inspired several lawsuits across the nation in the days that followed.[4] Among those lawsuits was this one: On February 3, 2017, the State filed its complaint and an initial motion for TRO, which sought to enjoin, nationwide, Sections 3(c), 5(a)–(c), and 5(e) of Executive Order No. 13,769. Pls.' Mot. for TRO, Feb. 3, 2017, ECF No. 2.

This Court did not rule on the State's initial TRO motion because later that same day, the United States District Court for the Western District of Washington entered a nationwide preliminary injunction enjoining the Government from enforcing the same provisions of Executive Order No. 13,769 targeted by the State here. *See Washington v. Trump*, 2017 WL 462040. As such, the Court stayed this case, effective February 7, 2017, specifying that the stay would continue "as long as

---

[4]*See, e.g., Mohammed v. United States*, No. 2:17-cv-00786-AB-PLA (C.D. Cal. Jan. 31, 2017); *City & Cty. of San Francisco v. Trump*, No. 3:17-cv-00485-WHO (N.D. Cal. Jan. 31, 2017); *Louhghalam v. Trump*, Civil Action No. 17-cv-10154, 2017 WL 386550 (D. Mass. Jan. 29, 2017); *Int'l Refugee Assistance Project v. Trump*, No. 8:17-0361-TDC (D. Md. filed Feb. 7, 2017); *Darweesh v. Trump*, 17 Civ. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017); *Aziz v. Trump*, — F. Supp. 3d —, 2017 WL 580855 (E.D. Va. Feb. 13, 2017); *Washington v. Trump*, Case No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *emergency stay denied*, 847 F.3d 1151 (9th Cir. 2017). This list is not exhaustive.

the February 3, 2017 injunction entered in *Washington v. Trump* remain[ed] in full force and effect, or until further order of this Court." ECF Nos. 27 & 32.

On February 4, 2017, the Government filed an emergency motion in the Ninth Circuit Court of Appeals seeking a stay of the *Washington* TRO, pending appeal.[5] *See Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017). The Ninth Circuit heard oral argument on February 7, after which it denied the emergency motion via written Order dated February 9, 2017. *See* Case No. 17-35105, ECF Nos. 125 (Tr. of Hr'g), 134 (Filed Order for Publication at 847 F.3d 1151).

On March 8, 2017, the Ninth Circuit granted the Government's unopposed motion to voluntarily dismiss the appeal. *See* Order, No. 17-35105 (9th Cir. Mar. 8, 2017), ECF No. 187. As a result, the same sections of Executive Order No. 13,769 initially challenged by the State in the instant action remain enjoined as of the date of this Order.

B. The New Executive Order

Section 2 of the new Executive Order suspends from "entry into the United States" for a period of 90 days, certain nationals of six countries referred to in Section 217(a)(12) of the Immigration and Nationality Act ("INA"), 8 U.S.C.

---

[5]The Government also requested "an immediate administrative stay pending full consideration of the emergency motion for a stay pending appeal" on February 4, 2017 (Emergency Mot. to Stay, No. 17-35105 (9th Cir.), ECF No. 14), which the Ninth Circuit panel swiftly denied (Order, No. 17-35105 (9th Cir.), ECF No. 15).

§ 1101 *et seq.*: Iran, Libya, Somalia, Sudan, Syria, and Yemen.[6] 8 U.S.C. § 1187(a)(12); Exec. Order § 2(c). The suspension of entry applies to nationals of these six countries who (1) are outside the United States on the new Executive Order's effective date of March 16, 2017; (2) do not have a valid visa on that date, and (3) did not have a valid visa as of 5:00 p.m. Eastern Standard Time on January 27, 2017 (the date of the prior Executive Order, No. 13,769). Exec. Order § 3(a).

The 90-day suspension does not apply to: (1) lawful permanent residents; (2) any foreign national admitted to or paroled into the United States on or after the Executive Order's effective date (March 16, 2017); (3) any individual who has a document other than a visa, valid on the effective date of the Executive Order or issued anytime thereafter, that permits travel to the United States, such as an advance parole document; (4) any dual national traveling on a passport not issued by one of the six listed countries; (5) any foreign national traveling on a diplomatic-type or other specified visa; and (6) any foreign national who has been granted asylum, any refugee already admitted to the United States, or any individual granted withholding of removal, advance parole, or protection under the Convention Against Torture. *See* Exec. Order § 3(b).

---

[6]Because of the "close cooperative relationship" between the United States and the Iraqi government, the Executive Order declares that Iraq no longer merits inclusion in this list of countries, as it was in Executive Order No. 13,769. Iraq "presents a special case." Exec. Order § 1(g).

Under Section 3(c)'s waiver provision, foreign nationals of the six countries who are subject to the suspension of entry may nonetheless seek entry on a case-by-case basis. The Executive Order includes the following list of circumstances when such waivers "could be appropriate:"

> (i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other longterm activity, is outside the United States on the effective date of the Order, seeks to reenter the United States to resume that activity, and denial of reentry during the suspension period would impair that activity;
>
> (ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of the Order for work, study, or other lawful activity;
>
> (iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;
>
> (iv) the foreign national seeks to enter the United States to visit a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;
>
> (v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;
>
> (vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of

such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOAI), 22 U.S.C. § 288 et seq., traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for admission at a land border port of entry or a preclearance location located in Canada; or

(ix) the foreign national is traveling as a United States Government sponsored exchange visitor.

Exec. Order § 3(c).

Section 6 of the Executive Order suspends the U.S. Refugee Admissions Program for 120 days. The suspension applies both to travel into the United States and to decisions on applications for refugee status for the same period. *See* Exec. Order § 6(a). It excludes refugee applicants who were formally scheduled for transit by the Department of State before the March 16, 2017 effective date. Like the 90-day suspension, the 120-day suspension includes a waiver provision that allows the Secretaries of State and DHS to admit refugee applicants on a case-by-case basis. *See* Exec. Order § 6(c). The Executive Order identifies examples of circumstances in which waivers may be warranted, including: where

the admission of the individual would allow the United States to conform its conduct to a pre-existing international agreement or denying admission would cause undue hardship. Exec. Order § 6(c). Unlike Executive Order No. 13,769, the new Executive Order does not expressly refer to an individual's status as a "religious minority" or refer to any particular religion, and it does not include a Syria-specific ban on refugees.

Section 1 states that the purpose of the Executive Order is to "protect [United States] citizens from terrorist attacks, including those committed by foreign nationals." Section 1(h) identifies two examples of terrorism-related crimes committed in the United States by persons entering the country either "legally on visas" or "as refugees":

> [1] In January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. [2] [I]n October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction[.]

Exec. Order § 1(h).

By its terms, the Executive Order also represents a response to the Ninth Circuit's decision in *Washington v. Trump*. *See* 847 F.3d 1151. According to the Government, it "clarifies and narrows the scope of Executive action regarding

immigration, extinguishes the need for emergent consideration, and eliminates the potential constitutional concerns identified by the Ninth Circuit." *See* Notice of Filing of Executive Order 4–5, ECF No. 56.

It is with this backdrop that we turn to consideration of Plaintiffs' restraining order application.

II. Plaintiffs' Motion For TRO

Plaintiffs' Second Amended Complaint (ECF No. 64) and Motion for TRO (ECF No. 65) contend that portions of the new Executive Order suffer from the same infirmities as those provisions of Executive Order No. 13,769 enjoined in *Washington*, 847 F.3d 1151. Once more, the State asserts that the Executive Order inflicts constitutional and statutory injuries upon its residents, employers, and educational institutions, while Dr. Elshikh alleges injuries on behalf of himself, his family, and members of his Mosque. SAC ¶ 1.

Plaintiffs allege that the Executive Order subjects portions of the State's population, including Dr. Elshikh and his family, to discrimination in violation of both the Constitution and the INA, denying them their right, among other things, to associate with family members overseas on the basis of their religion and national origin. The State purports that the Executive Order has injured its institutions,

economy, and sovereign interest in maintaining the separation between church and state. SAC ¶¶ 4–5.

According to Plaintiffs, the Executive order also results in "their having to live in a country and in a State where there is the perception that the Government has established a disfavored religion." SAC ¶ 5. Plaintiffs assert that by singling out nationals from the six predominantly Muslim countries, the Executive Order causes harm by stigmatizing not only immigrants and refugees, but also Muslim citizens of the United States. Plaintiffs point to public statements by the President and his advisors regarding the implementation of a "Muslim ban," which Plaintiffs contend is the tacit and illegitimate motivation underlying the Executive Order. *See* SAC ¶¶ 35–51. For example, Plaintiffs point to the following statements made contemporaneously with the implementation of Executive Order No. 13,769 and in its immediate aftermath:

> 48. In an interview on January 25, 2017, Mr. Trump discussed his plans to implement "extreme vetting" of people seeking entry into the United States. He remarked: "[N]o, it's not the Muslim ban. But it's countries that have tremendous terror. . . . [I]t's countries that people are going to come in and cause us tremendous problems."
>
> 49. Two days later, on January 27, 2017, President Trump signed an Executive Order entitled, "Protecting the Nation From Foreign Terrorist Entry into the United States."

50. The first Executive Order [No. 13,769] was issued without a notice and comment period and without interagency review. Moreover, the first Executive Order was issued with little explanation of how it could further its stated objective.

51. When signing the first Executive Order [No. 13,769], President Trump read the title, looked up, and said: "We all know what that means." President Trump said he was "establishing a new vetting measure to keep radical Islamic terrorists out of the United States of America," and that: "We don't want them here."

. . . .

58. In a January 27, 2017 interview with Christian Broadcasting Network, President Trump said that persecuted Christians would be given priority under the first Executive Order. He said (once again, falsely): "Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them."

59. The day after signing the first Executive Order [No. 13,769], President Trump's advisor, Rudolph Giuliani, explained on television how the Executive Order came to be. He said: "When [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

60. The President and his spokespersons defended the rushed nature of their issuance of the first Executive Order [No. 13,769] on January 27, 2017, by saying that their urgency was imperative to stop the inflow of dangerous persons to the United States. On January 30, 2017, President Trump tweeted: "If the ban were

> announced with a one week notice, the 'bad' would rush into our country during that week." In a forum on January 30, 2017 at George Washington University, White House spokesman Sean Spicer said: "At the end of the day, what was the other option? To rush it out quickly, telegraph it five days so that people could rush into this country and undermine the safety of our nation?" On February 9, 2017, President Trump claimed he had sought a one-month delay between signing and implementation, but was told by his advisors that "you can't do that because then people are gonna pour in before the toughness."

SAC ¶¶ 48–51, 58–60 (footnotes and citations omitted).

Plaintiffs also highlight statements by members of the Administration prior to the signing of the new Executive Order, seeking to tie its content to Executive Order No. 13,769 enjoined by the *Washington* TRO. In particular, they note that:

> On February 21, Senior Advisor to the President, Stephen Miller, told Fox News that the new travel ban would have the same effect as the old one. He said: "Fundamentally, you're still going to have the same basic policy outcome for the country, but you're going to be responsive to a lot of very technical issues that were brought up by the court and those will be addressed. But in terms of protecting the country, those basic policies are still going to be in effect."

SAC ¶ 74(a) (citing *Miller: New order will be responsive to the judicial ruling; Rep. Ron DeSantis: Congress has gotten off to a slow start, The First 100 Days* (Fox News television broadcast Feb. 21, 2017), transcript *available at* https://goo.gl/wcHvHH (rush transcript)). Plaintiffs argue that, in light of these and similar statements "where the President himself has repeatedly and publicly

espoused an improper motive for his actions, the President's action must be invalidated." Pls.' Mem. in Supp. of Mot. for TRO 2, ECF No. 65-1.

In addition to these accounts, Plaintiffs describe a draft report from the DHS, which they contend undermines the purported national security rationale for the Executive Order. *See* SAC ¶ 61 (citing SAC, Ex. 10, ECF No. 64-10). The February 24, 2017 draft report states that citizenship is an "unlikely indicator" of terrorism threats against the United States and that very few individuals from the seven countries included in Executive Order No. 13,769 had carried out or attempted to carry out terrorism activities in the United States. SAC ¶ 61 (citing SAC, Ex. 10, ECF No. 64-10). According to Plaintiffs, this and other evidence demonstrates the Administration's pretextual justification for the Executive Order.

Plaintiffs assert the following causes of action: (1) violation of the Establishment Clause of the First Amendment (Count I); (2) violation of the equal protection guarantees of the Fifth Amendment's Due Process Clause on the basis of religion, national origin, nationality, or alienage (Count II); (3) violation of the Due Process Clause of the Fifth Amendment based upon substantive due process rights (Count III); (4) violation of the procedural due process guarantees of the Fifth Amendment (Count IV); (5) violation of the INA due to discrimination on the basis of nationality, and exceeding the President's authority under Sections 1182(f) and

1185(a) (Count V); (6) substantially burdening the exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 200bb-1(a) (Count VI); (7) substantive violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (2)(A)–(C), through violations of the Constitution, INA, and RFRA (Count VII); and (8) procedural violation of the APA, 5 U.S.C. § 706 (2)(D) (Count VIII).

Plaintiffs contend that these alleged violations of law have caused and continue to cause them irreparable injury. To that end, through their Motion for TRO, Plaintiffs seek to temporarily enjoin Defendants from enforcing and implementing Sections 2 and 6 of the Executive Order. Mot. for TRO 4, ECF No. 65. They argue that "both of these sections are unlawful in all of their applications:" Section 2 discriminates on the basis of nationality, Sections 2 and 6 exceed the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a), and both provisions are motivated by anti-Muslim animus. TRO Mem. 50, Dkt. No. 65-1. Moreover, Plaintiffs assert that both sections infringe "on the 'due process rights' of numerous U.S. citizens and institutions by barring the entry of non-citizens with whom they have close relationships." TRO Mem. 50 (quoting *Washington*, 847 F.3d at 1166).

Defendants oppose the Motion for TRO. The Court held a hearing on the matter on March 15, 2017, before the Executive Order was scheduled to take effect.

DISCUSSION

I. Plaintiffs Have Demonstrated Standing At This Preliminary Phase

A. Article III Standing

Article III, Section 2 of the Constitution permits federal courts to consider only "cases" and "controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). "Those two words confine 'the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.'" *Id.* (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

"At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete

adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (en banc) (quoting *Massachusetts*, 549 U.S. at 517)).

"At this very preliminary stage of the litigation, the [Plaintiffs] may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their TRO motion to meet their burden." *Washington*, 847 F.3d at 1159 (citing *Lujan*, 504 U.S. at 561). "With these allegations and evidence, the [Plaintiffs] must make a 'clear showing of each element of standing.'" *Id.* (quoting *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 907 (2014)). At this preliminary stage of the proceedings, on the record presented, Plaintiffs meet the threshold Article III standing requirements.

B. **The State Has Standing**

The State alleges standing based both upon injuries to its proprietary interests and to its quasi-sovereign interests, *i.e.*, in its role as *parens patriae*.[7] Just as the

---

[7]The State's *parens patriae* theory focuses on the Executive Order

> subject[ing] citizens of Hawai'i like Dr. Elshikh to discrimination and marginalization while denying all residents of the State the benefits of a pluralistic and inclusive society. Hawai'i has a quasi-sovereign interest in 'securing [its] residents from the harmful effects of discrimination.' *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 609 (1982). The [Executive]

Ninth Circuit panel in *Washington* concluded on a similar record that the alleged harms to the states' proprietary interests as operators of their public universities were sufficient to support standing, the Court concludes likewise here. The Court does not reach the State's alternative standing theory based on the protection of the interests of its citizens as *parens patriae*. *See Washington*, 847 F.3d at 1168 n.5 ("The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States' proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.").

Hawaii primarily asserts two proprietary injuries stemming from the Executive Order. First, the State alleges the impacts that the Executive Order will have on the University of Hawaii system, both financial and intangible. The University is an arm of the State. *See* Haw. Const. art. 10, §§ 5, 6; Haw. Rev. Stat. ("HRS") § 304A-103. The University recruits students, permanent faculty, and visiting faculty from the targeted countries. *See, e.g.*, Suppl. Decl. of Risa E. Dickson ¶¶ 6–8, Mot. for TRO, Ex. D-1, ECF No. 66-6. Students or faculty

---

Order also harms Hawai'i by debasing its culture and tradition of ethnic diversity and inclusion.

TRO Mem. 48, ECF No. 65-1.

suspended from entry are deterred from studying or teaching at the University, now and in the future, irrevocably damaging their personal and professional lives and harming the educational institutions themselves. *See id.*

There is also evidence of a financial impact from the Executive Order on the University system. The University recruits from the six affected countries. It currently has twenty-three graduate students, several permanent faculty members, and twenty-nine visiting faculty members from the six countries listed. Suppl. Dickson Decl. ¶ 7. The State contends that any prospective recruits who are without visas as of March 16, 2017 will not be able to travel to Hawaii to attend the University. As a result, the University will not be able to collect the tuition that those students would have paid. Suppl. Dickson Decl. ¶ 8 ("Individuals who are neither legal permanent residents nor current visa holders will be entirely precluded from considering our institution."). These individuals' spouses, parents, and children likewise would be unable to join them in the United States. The State asserts that the Executive Order also risks "dissuad[ing] some of [the University's] current professors or scholars from continuing their scholarship in the United States and at [the University]." Suppl. Dickson Decl. ¶ 9.

The State argues that the University will also suffer non-monetary losses, including damage to the collaborative exchange of ideas among people of different

religions and national backgrounds on which the State's educational institutions depend. Suppl. Dickson Decl. ¶¶ 9–10, ECF no. 66-6; *see also* Original Dickson Decl. ¶ 13, Mot. for TRO, Ex. D-2, ECF, 66-7; SAC ¶ 94. This will impair the University's ability to recruit and accept the most qualified students and faculty, undermine its commitment to being "one of the most diverse institutions of higher education" in the world, Suppl. Dickson Decl. ¶ 11, and grind to a halt certain academic programs, including the University's Persian Language and Culture program, *id.* ¶ 8. *Cf. Washington*, 847 F.3d at 1160 ("[The universities] have a mission of 'global engagement' and rely on such visiting students, scholars, and faculty to advance their educational goals.").

These types of injuries are nearly indistinguishable from those found to support standing in the Ninth Circuit's decision in *Washington*. *See* 847 F.3d at 1161 ("The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be permitted to return if they leave. And we have no difficulty concluding that the States' injuries would be redressed if they

could obtain the relief they ask for: a declaration that the Executive Order violates the Constitution and an injunction barring its enforcement.").

The second proprietary injury alleged Hawaii alleges is to the State's main economic driver: tourism. The State contends that the Executive Order will "have the effect of depressing international travel to and tourism in Hawai'i," which "directly harms Hawaii's businesses and, in turn, the State's revenue." SAC ¶ 100, ECF No. 64. *See also* Suppl. Decl. of Luis P. Salaveria ¶¶ 6–10, Mot. for TRO, Ex. C-1, ECF No. 66-4 ("I expect, given the uncertainty the new executive order and its predecessor have caused to international travel generally, that these changing policies may depress tourism, business travel, and financial investments in Hawaii."). The State points to preliminary data from the Hawaii Tourism Authority, which suggests that during the interval of time that the first Executive Order was in place, the number of visitors to Hawai'i from the Middle East dropped (data including visitors from Iran, Iraq, Syria and Yemen). *See* Suppl. Decl. of George Szigeti, ¶¶ 5–8, Mot. for TRO, Ex. B-1, ECF No. 66-2; *see also* SAC ¶ 100 (identifying 278 visitors in January 2017, compared to 348 visitors from that same region in January 2016).[8] Tourism accounted for $15 billion in spending in 2015,

---

[8]This data relates to the prior Executive Order No. 13,769. At this preliminary stage, the Court looks to the earlier order's effect on tourism in order to gauge the economic impact of the new Executive Order, while understanding that the provisions of the two differ. Because the new

and a decline in tourism has a direct effect on the State's revenue. *See* SAC ¶ 18. Because there is preliminary evidence that losses of current and future revenue are traceable to the Executive Order, this injury to the State's proprietary interest also appears sufficient to confer standing. *Cf. Texas v. United States*, 809 F.3d 134, 155–56 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (holding that the "financial loss[es]" that Texas would bear, due to having to grant drivers licenses, constituted a concrete and immediate injury for standing purposes).

For purposes of the instant Motion for TRO, the State has preliminarily demonstrated that: (1) its universities will suffer monetary damages and intangible harms; (2) the State's economy is likely to suffer a loss of revenue due to a decline in tourism; (3) such harms can be sufficiently linked to the Executive Order; and (4) the State would not suffer the harms to its proprietary interests in the absence of implementation of the Executive Order. Accordingly, at this early stage of the litigation, the State has satisfied the requirements of Article III standing.[9]

Executive Order has yet to take effect, its precise economic impact cannot presently be determined.

[9]To the extent the Government argues that the State does not have standing to bring an Establishment Clause violation on its own behalf, the Court does not reach this argument. *Cf. Washington*, 847 F.3d at 1160 n.4 ("The Government argues that the States may not bring Establishment Clause claims because they lack Establishment Clause rights. Even if we assume that States lack such rights, an issue we need not decide, that is irrelevant in this case because the States are asserting the rights of their students and professors. Male doctors do not have personal rights in abortion and yet any physician may assert those rights on behalf of his female patients." (citing *Singleton v. Wulff*, 428 U.S. 106, 118 (1976))). Unlike in *Washington* where there was no

C. **Dr. Elshikh Has Standing**

Dr. Elshikh is an American citizen of Egyptian descent and has been a resident of Hawai'i for over a decade. Declaration of Ismail Elshikh ¶ 1, Mot. for TRO, Ex. A, ECF No. 66-1. He is the Imam of the Muslim Association of Hawai'i and a leader within Hawaii's Islamic community. Elshikh Decl. ¶ 2. Dr. Elshikh's wife is of Syrian descent, and their young children are American citizens. Dr. Elshikh and his family are Muslim. Elshikh Decl. ¶¶ 1, 3. His mother-in-law, also Muslim, is a Syrian national without a visa, who last visited the family in Hawaii in 2005. Elshikh Decl. ¶¶ 4–5.

In September 2015, Dr. Elshikh's wife filed an I-130 Petition for Alien Relative on behalf of her mother. On January 31, 2017, Dr. Elshikh called the National Visa Center and learned that his mother-in-law's visa application had been put on hold and would not proceed to the next stage of the process because of the implementation of Executive Order No. 13,769. Elshikh Decl. ¶ 4. Thereafter, on March 2, 2017, during the pendency of the nationwide injunction imposed by *Washington*, Dr. Elshikh received an email from the National Visa Center advising that his mother-in-law's visa application had progressed to the next stage and that her interview would be scheduled at an embassy overseas. Although no date was

---

individual plaintiff, Dr. Elshikh has standing to assert an Establishment Clause violation, as discussed herein.

given, the communication stated that most interviews occur within three months. Elshikh Decl. ¶ 4. Dr. Elshikh fears that although she has made progress toward obtaining a visa, his mother-in-law will be unable to enter the country if the new Executive Order is implemented. Elshikh Decl. ¶ 4. According to Plaintiffs, despite her pending visa application, Dr. Elshikh's mother-in-law would be barred in the short-term from entering the United States under the terms of Section 2(c) of the Executive Order, unless she is granted a waiver, because she is not a current visa holder.

Dr. Elshikh has standing to assert his claims, including an Establishment Clause violation. Courts observe that the injury-in-fact prerequisite can be "particularly elusive" in Establishment Clause cases because plaintiffs do not typically allege an invasion of a physical or economic interest. Despite that, a plaintiff may nonetheless show an injury that is sufficiently concrete, particularized, and actual to confer standing. *See Catholic League*, 624 F.3d at 1048–49; *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1250 (9th Cir. 2007) ("The concept of a 'concrete' injury is particularly elusive in the Establishment Clause context."). "The standing question, in plain English, is whether adherents to a religion have standing to challenge an official condemnation by their government of their religious views[.] Their 'personal stake' assures the 'concrete adverseness'

required." *Catholic League*, 624 F.3d at 1048–49. In Establishment Clause cases—

> [e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." Plaintiffs aver that not only does the resolution make them feel like second-class citizens, but that their participation in the political community will be chilled by the [government's] hostility to their church and their religion.

Id. at 1048–49 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). Dr. Elshikh attests that he and his family suffer just such injuries here. He declares that the effects of the Executive Order are "devastating to me, my wife and children." Elshikh Decl. ¶ 6, ECF No. 66-1.

Like his children, Dr. Elshikh is "deeply saddened by the message that [both Executive Orders] convey—that a broad travel-ban is 'needed' to prevent people from certain Muslim countries from entering the United States." Elshikh Decl. ¶ 1 ("Because of my allegiance to America, and my deep belief in the American ideals of democracy and equality, I am deeply saddened by the passage of the Executive Order barring nationals from now-six Muslim majority countries from entering the United States."); *id.* ¶ 3 (["My children] are deeply affected by the knowledge that the United States—their own country—would discriminate against individuals who are of the same ethnicity as them, including members of their own family, and who

hold the same religious beliefs. They do not fully understand why this is happening, but they feel hurt, confused, and sad.").

"Muslims in the Hawai'i Islamic community feel that the new Executive Order targets Muslim citizens because of their religious views and national origin. Dr. Elshikh believes that, as a result of the new Executive Order, he and members of the Mosque will not be able to associate as freely with those of other faiths." SAC ¶ 90. These injuries are sufficiently personal, concrete, particularized, and actual to confer standing in the Establishment Clause context.

The final two aspects of Article III standing—causation and redressability—are also satisfied. Dr. Elshikh's injuries are traceable to the new Executive Order and, if Plaintiffs prevail, a decision enjoining portions of the Executive Order would redress that injury. *See Catholic League*, 624 F.3d at 1053. At this preliminary stage of the litigation, Dr. Elshikh has accordingly carried his burden to establish standing under Article III.

II. Ripeness

"While standing is primarily concerned with who is a proper party to litigate a particular matter, ripeness addresses when litigation may occur." *Lee v. Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997). "[I]n many cases, ripeness coincides squarely with standing's injury in fact prong." *Thomas v. Anchorage Equal Rights Comm'n*,

220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). In fact, the ripeness inquiry is often "characterized as standing on a timeline." *Id.* "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)).

The Government argues that "the only concrete injury Elshikh alleges is that the Order 'will prevent [his] mother-in-law'—a Syrian national who lacks a visa—from visiting Elshikh and his family in Hawaii." These claims are not ripe, according to the Government, because there is a visa waiver process that Elshikh's mother-in-law has yet to even initiate. Govt. Mem. in Opp'n to Mot. for TRO (citing SAC ¶ 85), ECF No. 145.

The Government's premise is not true. Dr. Elshikh alleges direct, concrete injuries to both himself and his immediate family that are independent of his mother-in-law's visa status. *See, e.g.*, SAC ¶¶ 88–90; Elshikh Decl. ¶¶ 1, 3.[10] These alleged injuries have already occurred and will continue to occur once the

---

[10]There is no dispute that Dr. Elshikh's mother-in-law does not currently possess a valid visa, would be barred from entering as a Syrian national by Section 2(c) of the Executive Order, and has not yet applied for a waiver under Section 3(c) of the Executive Order. Since the Executive Order is not yet effective, it is difficult to see how she could. None of these propositions, however, alter the Court's finding that Dr. Elshikh has sufficiently established, at this preliminary stage, that he has suffered an injury-in-fact separate and apart from his mother-in-law that is sufficiently concrete, particularized, and actual to confer standing.

Executive Order is implemented and enforced—the injuries are not contingent ones. *Cf. 281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011) ("Plaintiffs' alleged injury is not based on speculation about a particular future prosecution or the defeat of a particular ballot question. . . . Here, the issue presented requires no further factual development, is largely a legal question, and chills allegedly protected First Amendment expression."); *see also Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) ("[W]hen the threatened enforcement effort implicates First Amendment [free speech] rights, the inquiry tilts dramatically toward a finding of standing.").

The Court turns to the merits of Plaintiffs' Motion for TRO.

III. Legal Standard: Preliminary Injunctive Relief

The underlying purpose of a TRO is to preserve the status quo and prevent irreparable harm before a preliminary injunction hearing is held. *Granny Goose Foods*, 415 U.S. 423, 439 (1974); *see also Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130–31 (9th Cir. 2006).

The standard for issuing a temporary restraining order is substantially identical to the standard for issuing a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A "plaintiff seeking a preliminary injunction must establish that he is likely to succeed

on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citation omitted).

"[I]f a plaintiff can only show that there are 'serious questions going to the merits'—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the 'balance of hardships tips *sharply* in the plaintiff's favor,' and the other two *Winter* factors are satisfied." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis by *Shell Offshore*)).

For the reasons that follow, Plaintiffs have met this burden here.

IV. Analysis of TRO Factors: Likelihood of Success on the Merits

The Court turns to whether Plaintiffs sufficiently establish a likelihood of success on the merits of their Count I claim that the Executive Order violates the Establishment Clause of the First Amendment. Because a reasonable, objective observer—enlightened by the specific historical context, contemporaneous public statements, and specific sequence of events leading to its issuance—would conclude that the Executive Order was issued with a purpose to disfavor a particular religion,

in spite of its stated, religiously-neutral purpose, the Court finds that Plaintiffs, and Dr. Elshikh in particular, are likely to succeed on the merits of their Establishment Clause claim.[11]

A. Establishment Clause

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). To determine whether the Executive Order runs afoul of that command, the Court is guided by the three-part test for Establishment Clause claims set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). According to *Lemon*, government action (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. *Id.* "Failure to satisfy any one of the three prongs of the *Lemon* test is sufficient to invalidate the challenged law or practice." *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1076–77 (9th Cir. 2010). Because the Executive Order at issue here cannot survive the secular purpose prong, the Court does not reach the balance of the criteria. *See id.* (noting that it is unnecessary to reach the second or third *Lemon* criteria if the challenged law or practice fails the first test).

---

[11]The Court expresses no views on Plaintiffs' due-process or INA-based statutory claims.

B. The Executive Order's Primary Purpose

It is undisputed that the Executive Order does not facially discriminate for or against any particular religion, or for or against religion versus non-religion. There is no express reference, for instance, to any religion nor does the Executive Order—unlike its predecessor—contain any term or phrase that can be reasonably characterized as having a religious origin or connotation.

Indeed, the Government defends the Executive Order principally because of its religiously neutral text —"[i]t applies to six countries that Congress and the prior Administration determined posed special risks of terrorism. [The Executive Order] applies to *all* individuals in those countries, regardless of their religion." Gov't. Mem. in Opp'n 40. The Government does not stop there. By its reading, the Executive Order could not have been religiously motivated because "the six countries represent only a small fraction of the world's 50 Muslim-majority nations, and are home to less than 9% of the global Muslim population . . . [T]he suspension covers *every* national of those countries, including millions of non-Muslim individuals[.]" Gov't. Mem. in Opp'n 42.

The illogic of the Government's contentions is palpable. The notion that one can demonstrate animus toward any group of people only by targeting all of them at once is fundamentally flawed. The Court declines to relegate its Establishment

Clause analysis to a purely mathematical exercise. *See Aziz*, 2017 WL 580855, at *9 (rejecting the argument that "the Court cannot infer an anti-Muslim animus because [Executive Order No. 13,769] does not affect all, or even most, Muslims," because "the Supreme Court has never reduced its Establishment Clause jurisprudence to a mathematical exercise. It is a discriminatory purpose that matters, no matter how inefficient the execution" (citation omitted)). Equally flawed is the notion that the Executive Order cannot be found to have targeted Islam because it applies to *all individuals* in the six referenced countries. It is undisputed, using the primary source upon which the Government itself relies, that these six countries have overwhelmingly Muslim populations that range from 90.7% to 99.8%.[12] It would therefore be no paradigmatic leap to conclude that targeting these countries likewise targets Islam. Certainly, it would be inappropriate to conclude, as the Government does, that it does not.

The Government compounds these shortcomings by suggesting that the Executive Order's neutral text is what this Court must rely on to evaluate purpose. Govt. Mem. in Opp'n at 42–43 ("[C]ourts may not 'look behind the exercise of [Executive] discretion' taken 'on the basis of a facially legitimate and bona fide

---

[12] *See* Pew-Templeton Global Religious Futures Project, Muslim Population by Country (2010), *available at* http://www.globalreligiousfutures.org/religions/muslims.

reason.'"). Only a few weeks ago, the Ninth Circuit commanded otherwise: "It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims." *Washington*, 847 F.3d at 1167–68 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."); *Larson*, 456 U.S. at 254–55 (holding that a facially neutral statute violated the Establishment Clause in light of legislative history demonstrating an intent to apply regulations only to minority religions); and *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (explaining that circumstantial evidence of intent, including the historical background of the decision and statements by decisionmakers, may be considered in evaluating whether a governmental action was motivated by a discriminatory purpose)). The Supreme Court has been even more emphatic: courts may not "turn a blind eye to the context in which [a] policy arose." *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005) (citation and quotation signals omitted).[13] "[H]istorical context and 'the specific sequence of events leading up

---

[13]In *McCreary*, the Supreme Court examined whether the posting of successive Ten Commandments displays at two county courthouses violated the Establishment Clause. 545 U.S. at 850–82.

to'" the adoption of a challenged policy are relevant considerations. *Id.* at 862; *see also Aziz*, 2017 WL 580855, at *7.

A review of the historical background here makes plain why the Government wishes to focus on the Executive Order's text, rather than its context. The record before this Court is unique. It includes significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order and its related predecessor. For example—

> In March 2016, Mr. Trump said, during an interview, "I think Islam hates us." Mr. Trump was asked, "Is there a war between the West and radical Islam, or between the West and Islam itself?" He replied: "It's very hard to separate. Because you don't know who's who."

SAC ¶ 41 (citing *Anderson Cooper 360 Degrees: Exclusive Interview With Donald Trump* (CNN television broadcast Mar. 9, 2016, 8:00 PM ET), transcript *available at* https://goo.gl/y7s2kQ)). In that same interview, Mr. Trump stated: "But there's a tremendous hatred. And we have to be very vigilant. We have to be very careful. And we can't allow people coming into this country who have this hatred of the United States. . . [a]nd of people that are not Muslim."

Plaintiffs allege that "[l]ater, as the presumptive Republican nominee, Mr. Trump began using facially neutral language, at times, to describe the Muslim ban." SAC ¶ 42. For example, they point to a July 24, 2016 interview:

> Mr. Trump was asked: "The Muslim ban. I think you've pulled back from it, but you tell me." Mr. Trump responded: "I don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim."

SAC ¶ 44; Ex. 7 (*Meet the Press* (NBC television broadcast July 24, 2016), transcript *available at* https://goo.gl/jHc6aU). And during an October 9, 2016 televised presidential debate, Mr. Trump was asked:

> "Your running mate said this week that the Muslim ban is no longer your position. Is that correct? And if it is, was it a mistake to have a religious test?" Mr. Trump replied: "The Muslim ban is something that in some form has morphed into a[n] extreme vetting from certain areas of the world." When asked to clarify whether "the Muslim ban still stands," Mr. Trump said, "It's called extreme vetting."

SAC ¶ 45 (citing The American Presidency Project, *Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri* (Oct. 9, 2016), *available at* https://goo.gl/iIzf0A)).

The Government appropriately cautions that, in determining purpose, courts should not look into the "veiled psyche" and "secret motives" of government decisionmakers and may not undertake a "judicial psychoanalysis of a drafter's heart of hearts." Govt. Opp'n at 40 (citing *McCreary*, 545 U.S. at 862). The Government need not fear. The remarkable facts at issue here require no such

impermissible inquiry. For instance, there is nothing "*veiled*" about this press release: "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States.[]" SAC ¶ 38, Ex. 6 (Press Release, Donald J. Trump for President, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), *available at* https://goo.gl/D3OdJJ)). Nor is there anything "*secret*" about the Executive's motive specific to the issuance of the Executive Order:

> Rudolph Giuliani explained on television how the Executive Order came to be. He said: "When [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

SAC ¶ 59, Ex. 8. On February 21, 2017, commenting on the then-upcoming revision to the Executive Order, the President's Senior Adviser, Stephen Miller, stated, "Fundamentally, [despite "technical" revisions meant to address the Ninth Circuit's concerns in *Washington*,] you're still going to have the same basic policy outcome [as the first]." SAC ¶ 74.

These plainly-worded statements,[14] made in the months leading up to and contemporaneous with the signing of the Executive Order, and, in many cases, made

---

[14]There are many more. *See, e.g.*, Br. of The Roderick and Solange MacArthur Justice Center as Amicus Curiae in Supp. of Pls.' Mot. for TRO, ECF No. 204, at 19-20 ("It's not unconstitutional keeping people out, frankly, and until we get a hold of what's going on. And then if you look at Franklin Roosevelt, a respected president, highly respected. Take a look at Presidential proclamations back a long time ago, 2525, 2526, and 2527 what he was doing with Germans, Italians, and Japanese because he had to do it. Because look we are at war with radical Islam.")

by the Executive himself, betray the Executive Order's stated secular purpose. Any reasonable, objective observer would conclude, as does the Court for purposes of the instant Motion for TRO, that the stated secular purpose of the Executive Order is, at the very least, "secondary to a religious objective" of temporarily suspending the entry of Muslims. *See McCreary*, 545 U.S. at 864.[15]

To emphasize these points, Plaintiffs assert that the stated national security reasons for the Executive Order are pretextual. Two examples of such pretext include the security rationales set forth in Section 1(h):

> "[I]n January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses." [Exec. Order] § 1(h). "And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was

---

(quoting Michael Barbaro and Alan Rappeport, *In Testy Exchange, Donald Trump Interrupts and 'Morning Joe' Cuts to Commercial*, New York Times (Dec. 8, 2015), *available at* https://www.nytimes.com/politics/first-draft/2015/12/08/in-testy-exchange-donaldtrump-interrupts-and-morning-joe-cuts-to-commercial/)); Br. of Muslim Advocates et al. as Amici Curiae in Supp. of Pls.' Mot. for TRO, ECF No. 198, at 10-11 ("On June 13, 2016, after the attack on a nightclub in Orlando, Florida, Mr. Trump said in a speech: 'I called for a ban after San Bernardino, and was met with great scorn and anger, but now many are saying I was right to do so.' Mr. Trump then specified that the Muslim ban would be 'temporary,' 'and apply to certain 'areas of the world when [sic] there is a proven history of terrorism against the United States, Europe or our allies, until we understand how to end these threats.'") (quoting Transcript: Donald Trump's national security speech, *available at* http://www.politico.com/story/2016/06/transcript-donald-trump-national-security-speech-22427).

[15]This Court is not the first to examine these issues. In *Aziz v. Trump*, United States District Court Judge Leonie Brinkema determined that plaintiffs were likely to succeed on the merits of their Establishment Clause claim as it related to Executive Order No. 13,769. Accordingly, Judge Brinkema granted the Commonwealth of Virginia's motion for preliminary injunction. *Aziz v. Trump*, ___ F. Supp. 3d ___, 2017 WL 580855, at *7–*10 (E.D. Va. Feb. 13, 2017).

> sentenced to 30 years in prison for attempting to use a weapon of mass destruction[.]" *Id.* Iraq is no longer included in the ambit of the travel ban, *id.*, and the Order states that a waiver could be granted for a foreign national that is a "young child." *Id.* § 3(c)(v).

TRO Mem. 13. Other indicia of pretext asserted by Plaintiffs include the delayed timing of the Executive Order, which detracts from the national security urgency claimed by the Administration, and the Executive Order's focus on nationality, which could have the paradoxical effect of "bar[ring] entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war," revealing a "gross mismatch between the [Executive] Order's ostensible purpose and its implementation and effects." Pls.' Reply 20 (citation omitted).

While these additional assertions certainly call the motivations behind the Executive Order into greater question,[16] they are not necessary to the Court's Establishment Clause determination. *See Aziz*, 2017 WL 580855, at *8 (the Establishment Clause concerns addressed by the district court's order "do not involve an assessment of the merits of the president's national security judgment. Instead, the question is whether [Executive Order No. 13,769] was animated by

---

[16] *See also* Br. of T.A., a U.S. Resident of Yemeni Descent, as Amicus Curiae in Supp. of Pls.' Mot. for TRO, ECF No. 200, at 15-25 (detailing evidence contrary to the Executive Order's national security justifications).

national security concerns at all, as opposed to the impermissible notion of, in the context of entry, disfavoring one religious group, and in the context of refugees, favoring another religious group").

Nor does the Court's preliminary determination foreclose future Executive action. As the Supreme Court noted in *McCreary*, in preliminarily enjoining the third iteration of a Ten Commandments display, "we do not decide that the [government's] past actions forever taint any effort on their part to deal with the subject matter." *McCreary*, 545 U.S. at 873–74; *see also Felix v. City of Bloomfield*, 841 F.3d 848, 863 (10th Cir. 2016) ("In other words, it is possible that a government may begin with an impermissible purpose, or create an unconstitutional effect, but later take affirmative actions to neutralize the endorsement message so that "adherence to a religion [is not] relevant in any way to a person's standing in the political community." (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring))). Here, it is not the case that the Administration's past conduct must forever taint any effort by it to address the security concerns of the nation. Based upon the current record available, however, the Court cannot find the actions taken during the interval between revoked Executive Order No. 13,769 and the new Executive Order to be "genuine changes in constitutionally significant

conditions." *McCreary*, 545 U.S. at 874.[17] The Court recognizes that "purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense." *Id.* Yet, context may change during the course of litigation, and the Court is prepared to respond accordingly.

Last, the Court emphasizes that its preliminary assessment rests on the peculiar circumstances and specific historical record present here. *Cf. Aziz*, 2017 WL 580855, at *9 ("The Court's conclusion rests on the highly particular 'sequence of events' leading to this specific [Executive Order No. 13,769] and the dearth of evidence indicating a national security purpose. The evidence in this record focuses on the president's statements about a 'Muslim ban' and the link Giuliani

---

[17]The Tenth Circuit asked: "What would be enough to meet this standard?"

> The case law does not yield a ready answer. But from the above principles we conclude that a government cure should be (1) purposeful, (2) public, and (3) at least as persuasive as the initial endorsement of religion. It should be purposeful enough for an objective observer to know, unequivocally, that the government does not endorse religion. It should be public enough so that people need not burrow into a difficult-to-access legislative record for evidence to assure themselves that the government is not endorsing a religious view. And it should be persuasive enough to countermand the preexisting message of religious endorsement.

Felix, 841 F.3d 863–64.

established between those statements and the [Executive Order]."") (citing *McCreary*, 545 U.S. at 862).

V. Analysis of TRO Factors: Irreparable Harm

Dr. Elshikh has made a preliminary showing of direct, concrete injuries to the exercise of his Establishment Clause rights. *See, e.g.*, SAC ¶¶ 88–90; Elshikh Decl. ¶¶ 1, 3. These alleged injuries have already occurred and likely will continue to occur upon implementation of the Executive Order.

Indeed, irreparable harm may be *presumed* with the finding of a violation of the First Amendment. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Washington*, 847 F.3d at 1169 (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'")) (additional citations omitted). Because Dr. Elshikh is likely to succeed on the merits of his Establishment Clause claim, the Court finds that the second factor of the *Winter* test is satisfied—that Dr. Elshikh is likely to suffer irreparable injury in the absence of a TRO.

VI. Analysis of TRO Factors: The Balance of Equities and Public Interest Weigh in Favor of Granting Emergency Relief

The final step in determining whether to grant the Plaintiffs' Motion for TRO is to assess the balance of equities and examine the general public interests that will be affected. Here, the substantial controversy surrounding this Executive Order, like its predecessor, illustrates that important public interests are implicated by each party's positions. *See Washington*, 847 F.3d at 1169. For example, the Government insists that the Executive Order is intended "to protect the Nation from terrorist activities by foreign nationals admitted to the United States[.]" Exec. Order, preamble. National security is unquestionably important to the public at large. Plaintiffs and the public, on the other hand, have a vested interest in the "free flow of travel, in avoiding separation of families, and in freedom from discrimination." *Washington*, 847 F.3d at 1169–70.

As discussed above, Plaintiffs have shown a strong likelihood of succeeding on their claim that the Executive Order violates First Amendment rights under the Constitution. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (emphasis added) (citing *Elrod*, 427 U.S. at 373); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public

interest." (citing *Lamprecht v. FCC*, 958 F.2d 382, 390 (D.C. Cir. 1992); *G & V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

When considered alongside the constitutional injuries and harms discussed above, and the questionable evidence supporting the Government's national security motivations, the balance of equities and public interests justify granting the Plaintiffs' TRO. *See Aziz*, 2017 WL 580855, at * 10. Nationwide relief is appropriate in light of the likelihood of success on the Establishment Clause claim.

CONCLUSION

Based on the foregoing, Plaintiffs' Motion for TRO is hereby GRANTED.

TEMPORARY RESTRAINING ORDER

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).

The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this order be filed.

Pursuant to Federal Rule of Civil Procedure 65(b)(2), the Court intends to set an expedited hearing to determine whether this Temporary Restraining Order should be extended. The parties shall submit a stipulated briefing and hearing schedule for the Court's approval forthwith.

IT IS SO ORDERED.

Dated: March 15, 2017 at Honolulu, Hawai'i.

Derrick K. Watson
United States District Judge

Federal Register
Vol. 82, No. 20
Wednesday, February 1, 2017

Presidential Documents

Title 3—

The President

Executive Order 13769 of January 27, 2017

Protecting the Nation From Foreign Terrorist Entry Into the United States

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and section 301 of title 3, United States Code, and to protect the American people from terrorist attacks by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. *Purpose.* The visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States. Perhaps in no instance was that more apparent than the terrorist attacks of September 11, 2001, when State Department policy prevented consular officers from properly scrutinizing the visa applications of several of the 19 foreign nationals who went on to murder nearly 3,000 Americans. And while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.

Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.

Sec. 2. *Policy.* It is the policy of the United States to protect its citizens from foreign nationals who intend to commit terrorist attacks in the United States; and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.

Sec. 3. *Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall immediately conduct a review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President

a report on the results of the review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed for adjudications and a list of countries that do not provide adequate information, within 30 days of the date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals, pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C–2 visas for travel to the United Nations, and G–1, G–2, G–3, and G–4 visas).

(d) Immediately upon receipt of the report described in subsection (b) of this section regarding the information needed for adjudications, the Secretary of State shall request all foreign governments that do not supply such information to start providing such information regarding their nationals within 60 days of notification.

(e) After the 60-day period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State, shall submit to the President a list of countries recommended for inclusion on a Presidential proclamation that would prohibit the entry of foreign nationals (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C–2 visas for travel to the United Nations, and G–1, G–2, G–3, and G–4 visas) from countries that do not provide the information requested pursuant to subsection (d) of this section until compliance occurs.

(f) At any point after submitting the list described in subsection (e) of this section, the Secretary of State or the Secretary of Homeland Security may submit to the President the names of any additional countries recommended for similar treatment.

(g) Notwithstanding a suspension pursuant to subsection (c) of this section or pursuant to a Presidential proclamation described in subsection (e) of this section, the Secretaries of State and Homeland Security may, on a case-by-case basis, and when in the national interest, issue visas or other immigration benefits to nationals of countries for which visas and benefits are otherwise blocked.

(h) The Secretaries of State and Homeland Security shall submit to the President a joint report on the progress in implementing this order within 30 days of the date of this order, a second report within 60 days of the date of this order, a third report within 90 days of the date of this order, and a fourth report within 120 days of the date of this order.

Sec. 4. *Implementing Uniform Screening Standards for All Immigration Programs.* (a) The Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation shall implement a program, as part of the adjudication process for immigration benefits, to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission. This program will include the development of a uniform screening standard and procedure, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not

used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that the applicant is who the applicant claims to be; a process to evaluate the applicant's likelihood of becoming a positively contributing member of society and the applicant's ability to make contributions to the national interest; and a mechanism to assess whether or not the applicant has the intent to commit criminal or terrorist acts after entering the United States.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation, shall submit to the President an initial report on the progress of this directive within 60 days of the date of this order, a second report within 100 days of the date of this order, and a third report within 200 days of the date of this order.

Sec. 5. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.* (a) The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. Refugee applicants who are already in the USRAP process may be admitted upon the initiation and completion of these revised procedures. Upon the date that is 120 days after the date of this order, the Secretary of State shall resume USRAP admissions only for nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that such additional procedures are adequate to ensure the security and welfare of the United States.

(b) Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.

(c) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.

(d) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any such entry until such time as I determine that additional admissions would be in the national interest.

(e) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when the person is already in transit and denying admission would cause undue hardship—and it would not pose a risk to the security or welfare of the United States.

(f) The Secretary of State shall submit to the President an initial report on the progress of the directive in subsection (b) of this section regarding prioritization of claims made by individuals on the basis of religious-based persecution within 100 days of the date of this order and shall submit a second report within 200 days of the date of this order.

(g) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of Homeland Security shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 6. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretaries of State and Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority in section 212 of the INA, 8 U.S.C. 1182, relating to the terrorism grounds of inadmissibility, as well as any related implementing memoranda.

Sec. 7. *Expedited Completion of the Biometric Entry-Exit Tracking System.* (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for all travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive contained in subsection (a) of this section. The initial report shall be submitted within 100 days of the date of this order, a second report shall be submitted within 200 days of the date of this order, and a third report shall be submitted within 365 days of the date of this order. Further, the Secretary shall submit a report every 180 days thereafter until the system is fully deployed and operational.

Sec. 8. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1202, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that non-immigrant visa-interview wait times are not unduly affected.

Sec. 9. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If a country does not treat United States nationals seeking nonimmigrant visas in a reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by the foreign country, to the extent practicable.

Sec. 10. *Transparency and Data Collection.* (a) To be more transparent with the American people, and to more effectively implement policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available within 180 days, and every 180 days thereafter:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation, or material support to a terrorism-related organization, or any other national security reasons since the date of this order or the last reporting period, whichever is later;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States, since the date of this order or the last reporting period, whichever is later; and

(iii) information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals, since the date of this order or the last reporting period, whichever is later; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security and the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of State shall, within one year of the date of this order, provide a report on the estimated long-term costs of the USRAP at the Federal, State, and local levels.

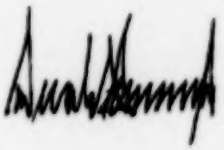
Sec. 11. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 27, 2017.

[FR Doc. 2017-02281
Filed 1-31-17; 11:15 am]
Billing code 3295-F7-P

Federal Register
Vol. 82, No. 45
Thursday, March 9, 2017

Presidential Documents

Title 3—

The President

Executive Order 13780 of March 6, 2017

Protecting the Nation From Foreign Terrorist Entry Into the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and section 301 of title 3, United States Code, and to protect the Nation from terrorist activities by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. *Policy and Purpose.* (a) It is the policy of the United States to protect its citizens from terrorist attacks, including those committed by foreign nationals. The screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program (USRAP) play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States. It is therefore the policy of the United States to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP.

(b) On January 27, 2017, to implement this policy, I issued Executive Order 13769 (Protecting the Nation from Foreign Terrorist Entry into the United States).

(i) Among other actions, Executive Order 13769 suspended for 90 days the entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. These are countries that had already been identified as presenting heightened concerns about terrorism and travel to the United States. Specifically, the suspension applied to countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), in which Congress restricted use of the Visa Waiver Program for nationals of, and aliens recently present in, (A) Iraq or Syria, (B) any country designated by the Secretary of State as a state sponsor of terrorism (currently Iran, Syria, and Sudan), and (C) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence. In 2016, the Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern for travel purposes, based on consideration of three statutory factors related to terrorism and national security: "(I) whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States; (II) whether a foreign terrorist organization has a significant presence in the country or area; and (III) whether the country or area is a safe haven for terrorists." 8 U.S.C. 1187(a)(12)(D)(ii). Additionally, Members of Congress have expressed concerns about screening and vetting procedures following recent terrorist attacks in this country and in Europe.

(ii) In ordering the temporary suspension of entry described in subsection (b)(i) of this section, I exercised my authority under Article II of the Constitution and under section 212(f) of the INA, which provides in relevant part: "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."

8 U.S.C. 1182(f). Under these authorities, I determined that, for a brief period of 90 days, while existing screening and vetting procedures were under review, the entry into the United States of certain aliens from the seven identified countries—each afflicted by terrorism in a manner that compromised the ability of the United States to rely on normal decision-making procedures about travel to the United States—would be detrimental to the interests of the United States. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to grant case-by-case waivers when they determined that it was in the national interest to do so.

(iii) Executive Order 13769 also suspended the USRAP for 120 days. Terrorist groups have sought to infiltrate several nations through refugee programs. Accordingly, I temporarily suspended the USRAP pending a review of our procedures for screening and vetting refugees. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to jointly grant case-by-case waivers when they determined that it was in the national interest to do so.

(iv) Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities—whoever they are and wherever they reside—to avail themselves of the USRAP in light of their particular challenges and circumstances.

(c) The implementation of Executive Order 13769 has been delayed by litigation. Most significantly, enforcement of critical provisions of that order has been temporarily halted by court orders that apply nationwide and extend even to foreign nationals with no prior or substantial connection to the United States. On February 9, 2017, the United States Court of Appeals for the Ninth Circuit declined to stay or narrow one such order pending the outcome of further judicial proceedings, while noting that the "political branches are far better equipped to make appropriate distinctions" about who should be covered by a suspension of entry or of refugee admissions.

(d) Nationals from the countries previously identified under section 217(a)(12) of the INA warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

(e) The following are brief descriptions, taken in part from the Department of State's *Country Reports on Terrorism 2015* (June 2016), of some of the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States:

(i) *Iran.* Iran has been designated as a state sponsor of terrorism since 1984 and continues to support various terrorist groups, including Hizballah, Hamas, and terrorist groups in Iraq. Iran has also been linked to support

for al-Qa'ida and has permitted al-Qa'ida to transport funds and fighters through Iran to Syria and South Asia. Iran does not cooperate with the United States in counterterrorism efforts.

(ii) *Libya.* Libya is an active combat zone, with hostilities between the internationally recognized government and its rivals. In many parts of the country, security and law enforcement functions are provided by armed militias rather than state institutions. Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions to expand their presence in the country. The Libyan government provides some cooperation with the United States' counterterrorism efforts, but it is unable to secure thousands of miles of its land and maritime borders, enabling the illicit flow of weapons, migrants, and foreign terrorist fighters. The United States Embassy in Libya suspended its operations in 2014.

(iii) *Somalia.* Portions of Somalia have been terrorist safe havens. Al-Shabaab, an al-Qa'ida-affiliated terrorist group, has operated in the country for years and continues to plan and mount operations within Somalia and in neighboring countries. Somalia has porous borders, and most countries do not recognize Somali identity documents. The Somali government cooperates with the United States in some counterterrorism operations but does not have the capacity to sustain military pressure on or to investigate suspected terrorists.

(iv) *Sudan.* Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas. Historically, Sudan provided safe havens for al-Qa'ida and other terrorist groups to meet and train. Although Sudan's support to al-Qa'ida has ceased and it provides some cooperation with the United States' counterterrorism efforts, elements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.

(v) *Syria.* Syria has been designated as a state sponsor of terrorism since 1979. The Syrian government is engaged in an ongoing military conflict against ISIS and others for control of portions of the country. At the same time, Syria continues to support other terrorist groups. It has allowed or encouraged extremists to pass through its territory to enter Iraq. ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States. The United States Embassy in Syria suspended its operations in 2012. Syria does not cooperate with the United States' counterterrorism efforts.

(vi) *Yemen.* Yemen is the site of an ongoing conflict between the incumbent government and the Houthi-led opposition. Both ISIS and a second group, al-Qa'ida in the Arabian Peninsula (AQAP), have exploited this conflict to expand their presence in Yemen and to carry out hundreds of attacks. Weapons and other materials smuggled across Yemen's porous borders are used to finance AQAP and other terrorist activities. In 2015, the United States Embassy in Yemen suspended its operations, and embassy staff were relocated out of the country. Yemen has been supportive of, but has not been able to cooperate fully with, the United States in counterterrorism efforts.

(f) In light of the conditions in these six countries, until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high. Accordingly, while that assessment is ongoing, I am imposing a temporary pause on the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, subject to categorical exceptions and case-by-case waivers, as described in section 3 of this order.

(g) Iraq presents a special case. Portions of Iraq remain active combat zones. Since 2014, ISIS has had dominant influence over significant territory in northern and central Iraq. Although that influence has been significantly

reduced due to the efforts and sacrifices of the Iraqi government and armed forces, working along with a United States-led coalition, the ongoing conflict has impacted the Iraqi government's capacity to secure its borders and to identify fraudulent travel documents. Nevertheless, the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment for Iraq. In particular, those Iraqi government forces that have fought to regain more than half of the territory previously dominated by ISIS have shown steadfast determination and earned enduring respect as they battle an armed group that is the common enemy of Iraq and the United States. In addition, since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal. Decisions about issuance of visas or granting admission to Iraqi nationals should be subjected to additional scrutiny to determine if applicants have connections with ISIS or other terrorist organizations, or otherwise pose a risk to either national security or public safety.

(h) Recent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security. Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States. They have included not just persons who came here legally on visas but also individuals who first entered the country as refugees. For example, in January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon. The Attorney General has reported to me that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation.

(i) Given the foregoing, the entry into the United States of foreign nationals who may commit, aid, or support acts of terrorism remains a matter of grave concern. In light of the Ninth Circuit's observation that the political branches are better suited to determine the appropriate scope of any suspensions than are the courts, and in order to avoid spending additional time pursuing litigation, I am revoking Executive Order 13769 and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens.

Sec. 2. *Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security

shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

(d) Upon submission of the report described in subsection (b) of this section regarding the information needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.

(e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

(f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.

(g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.

Sec. 3. *Scope and Implementation of Suspension.*

(a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspension of entry pursuant to section 2 of this order shall apply only to foreign nationals of the designated countries who:

(i) are outside the United States on the effective date of this order;

(ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and

(iii) do not have a valid visa on the effective date of this order.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this order shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the effective date of this order;

(iii) any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document;

(iv) any dual national of a country designated under section 2 of this order when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C–2 visa for travel to the United Nations, or G–1, G–2, G–3, or G–4 visa; or

(vi) any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspension of entry pursuant to section 2 of this order, a consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegee, may, in the consular officer's or the CBP official's discretion, decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest. Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa issuance process will be effective both for the issuance of a visa and any subsequent entry on that visa, but will leave all other requirements for admission or entry unchanged. Case-by-case waivers could be appropriate in circumstances such as the following:

(i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;

(ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

(iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

(iv) the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.*, a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

(v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.*, traveling for purposes of conducting meetings or business with the United States Government, or traveling

to conduct business on behalf of an international organization not designated under the IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or

(ix) the foreign national is traveling as a United States Government-sponsored exchange visitor.

Sec. 4. *Additional Inquiries Related to Nationals of Iraq.* An application by any Iraqi national for a visa, admission, or other immigration benefit should be subjected to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership, since Executive Order 13769 was issued, concerning individuals suspected of ties to ISIS or other terrorist organizations and individuals coming from territories controlled or formerly controlled by ISIS. Such review shall include consideration of whether the applicant has connections with ISIS or other terrorist organizations or with territory that is or has been under the dominant influence of ISIS, as well as any other information bearing on whether the applicant may be a threat to commit acts of terrorism or otherwise threaten the national security or public safety of the United States.

Sec. 5. *Implementing Uniform Screening and Vetting Standards for All Immigration Programs.* (a) The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence shall implement a program, as part of the process for adjudications, to identify individuals who seek to enter the United States on a fraudulent basis, who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry. This program shall include the development of a uniform baseline for screening and vetting standards and procedures, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that applicants are who they claim to be; a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States; and any other appropriate means for ensuring the proper collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Director of National Intelligence, shall submit to the President an initial report on the progress of the program described in subsection (a) of this section within 60 days of the effective date of this order, a second report within 100 days of the effective date of this order, and a third report within 200 days of the effective date of this order.

Sec. 6. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.* (a) The Secretary of State shall suspend travel of refugees into the United States under the USRAP, and the Secretary of Homeland Security shall suspend decisions on applications for refugee status, for 120 days after the effective date of this order, subject to waivers pursuant to subsection (c) of this section. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. The suspension described in this subsection shall not apply to refugee applicants who, before the effective date of this order, have been formally scheduled for transit by the Department of State. The Secretary of State shall resume travel of refugees into the

United States under the USRAP 120 days after the effective date of this order, and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to this subsection are adequate to ensure the security and welfare of the United States.

(b) Pursuant to section 212(f) of the INA, I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any entries in excess of that number until such time as I determine that additional entries would be in the national interest.

(c) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretary of State and the Secretary of Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States, including in circumstances such as the following: the individual's entry would enable the United States to conform its conduct to a preexisting international agreement or arrangement, or the denial of entry would cause undue hardship.

(d) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of State shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 7. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretary of State and the Secretary of Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority permitted by section 212(d)(3)(B) of the INA, 8 U.S.C. 1182(d)(3)(B), relating to the terrorism grounds of inadmissibility, as well as any related implementing directives or guidance.

Sec. 8. *Expedited Completion of the Biometric Entry-Exit Tracking System.* (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for in-scope travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive set forth in subsection (a) of this section. The initial report shall be submitted within 100 days of the effective date of this order, a second report shall be submitted within 200 days of the effective date of this order, and a third report shall be submitted within 365 days of the effective date of this order. The Secretary of Homeland Security shall submit further reports every 180 days thereafter until the system is fully deployed and operational.

Sec. 9. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1202, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions. This suspension shall not apply to any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C–2 visa for travel to the United Nations, or G–1, G–2, G–3, or G–4 visa; traveling for purposes related to an international organization designated under the IOIA; or traveling for purposes of conducting meetings or business with the United States Government.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that nonimmigrant visa-interview wait times are not unduly affected.

Sec. 10. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements and arrangements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If another country does not treat United States nationals seeking nonimmigrant visas in a truly reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by that foreign country, to the extent practicable.

Sec. 11. *Transparency and Data Collection.* (a) To be more transparent with the American people and to implement more effectively policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available the following information:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation with or provision of material support to a terrorism-related organization, or any other national-security-related reasons;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and who have engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States;

(iii) information regarding the number and types of acts of gender-based violence against women, including so-called "honor killings," in the United States by foreign nationals; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security or the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of Homeland Security shall release the initial report under subsection (a) of this section within 180 days of the effective date of this order and shall include information for the period from September 11, 2001, until the date of the initial report. Subsequent reports shall be issued every 180 days thereafter and reflect the period since the previous report.

Sec. 12. *Enforcement.* (a) The Secretary of State and the Secretary of Homeland Security shall consult with appropriate domestic and international partners, including countries and organizations, to ensure efficient, effective, and appropriate implementation of the actions directed in this order.

(b) In implementing this order, the Secretary of State and the Secretary of Homeland Security shall comply with all applicable laws and regulations, including, as appropriate, those providing an opportunity for individuals to claim a fear of persecution or torture, such as the credible fear determination for aliens covered by section 235(b)(1)(A) of the INA, 8 U.S.C. 1225(b)(1)(A).

(c) No immigrant or nonimmigrant visa issued before the effective date of this order shall be revoked pursuant to this order.

(d) Any individual whose visa was marked revoked or marked canceled as a result of Executive Order 13769 shall be entitled to a travel document confirming that the individual is permitted to travel to the United States and seek entry. Any prior cancellation or revocation of a visa that was solely pursuant to Executive Order 13769 shall not be the basis of inadmissibility for any future determination about entry or admissibility.

(e) This order shall not apply to an individual who has been granted asylum, to a refugee who has already been admitted to the United States, or to an individual granted withholding of removal or protection under the Convention Against Torture. Nothing in this order shall be construed to limit the ability of an individual to seek asylum, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.

Sec. 13. *Revocation.* Executive Order 13769 of January 27, 2017, is revoked as of the effective date of this order.

Sec. 14. *Effective Date.* This order is effective at 12:01 a.m., eastern daylight time on March 16, 2017.

Sec. 15. *Severability.* (a) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its other provisions to any other persons or circumstances shall not be affected thereby.

(b) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements.

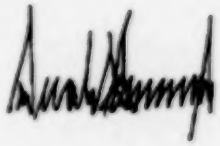
Sec. 16. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
March 6, 2017.

[FR Doc. 2017–04837
Filed 3–8–17; 11:15 am]
Billing code 3295–F7–P

Supreme Court, U S
FILED
JUN 12 2017
OFFICE OF THE CLERK

No. 16A-1191

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Applicants,

v.

STATE OF HAWAII, *et al.*,

Respondents.

RESPONSE TO APPLICATION FOR STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DOUGLAS S. CHIN
Attorney General of the State of Hawaii
CLYDE J. WADSWORTH
Solicitor General of the State of Hawaii
DEIRDRE MARIE-IHA
DONNA H. KALAMA
KIMBERLY T. GUIDRY
ROBERT T. NAKATSUJI
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL,
STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

Counsel for the State of Hawaii

NEAL KUMAR KATYAL*
COLLEEN ROH SINZDAK
MITCHELL P. REICH
ELIZABETH HAGERTY
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com
**Counsel of Record*

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

SARA SOLOW
ALEXANDER B. BOWERMAN
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103

Counsel for Respondents

RECEIVED
JUN 15 2017
OFFICE OF THE CLERK
SUPREME COURT, U S

June 12, 2017

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT 3

ARGUMENT 10

I. THIS COURT IS UNLIKELY TO VACATE THE INJUNCTION 11

A. The Challenge To The Order Is Justiciable 12

1. Dr. Elshikh Has Standing 13

2. Hawaii Has Standing 16

3. The Order Is Otherwise Reviewable 19

B. The Order Violates The Establishment Clause 19

1. *Mandel* Does Not Exempt The Order From Meaningful Constitutional Review 20

2. The Establishment Clause Forbids The President From Enacting A Thinly Veiled Muslim Ban 24

C. The Order Exceeds The President's Authority Under § 1182(f) 28

1. The President May Not Use General Grants Of Authority To Override Carefully-Reticulated Statutory Schemes 28

2. The Order Repeatedly Subverts Existing Statutory Authority 30

II. THE EQUITIES WEIGH AGAINST STAYING THE INJUNCTION 33

III. THE SCOPE OF THE INJUNCTION IS PROPER 38

CONCLUSION 40

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. *Wright*,
468 U.S. 737 (1984) 15

Ass'n of Data Processing Serv. Orgs., Inc. v. *Camp*,
397 U.S. 150 (1970) 13

Bank of Am. Corp. v. *City of Miami*,
137 S. Ct. 1296 (2017) 17

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*,
508 U.S. 520 (1993) 26, 39

Commodity Futures Trading Comm'n v. *British Am. Commodity Options Corp.*,
434 U.S. 1316 (1977) (Marshall, J., in chambers) 34

Conkright v. *Frommert*,
556 U.S. 1401 (2009) (Ginsburg, J., in chambers) 11

Czyzewski v. *Jevic Holding Corp.*,
137 S. Ct. 973 (2017) 17

Dayton Bd. of Educ. v. *Brinkman*,
439 U.S. 1358 (1978) (Rehnquist, J., in chambers) 33

Edwards v. *Aguillard*,
482 U.S. 578 (1987) 25, 26

Elrod v. *Burns*,
427 U.S. 347 (1976) 38

Engel v. *Vitale*,
370 U.S. 421 (1962) 3

FDA v. *Brown & Williamson Tobacco Corp.*,
529 U.S. 120 (2000) 28

Franklin v. *Massachusetts*,
505 U.S. 788 (1992) 40

Gonzales v. *Oregon*,
546 U.S. 243 (2006) 28

Gratz v. *Bollinger*,
539 U.S. 244 (2003) 14

Honeycutt v. *United States*,
No. 16-142, slip op. (U.S. June 5, 2017) 28

INS v. *Legalization Assistance Project*,
510 U.S. 1301 (1993) (O'Connor, J., in chambers) 10

IRAP v. *Trump*,
No. 17-1351, slip op. (4th Cir. May 25, 2017) 31, 32

Judulang v. *Holder*,
565 U.S. 42 (2011) 31

Kerry v. *Din*,
135 S. Ct. 2128 (2015) 19, 21, 30

Kleindienst v. *Mandel*,
408 U.S. 753 (1972) ..... *passim*

United States ex rel. Knauff v. *Shaughnessy*,
338 U.S. 537 (1950) 29

Korematsu v. *United States*,
323 U.S. 214 (1944) 32

Krause v. *Rhodes*,
434 U.S. 1335 (1977) (Stewart, J., in chambers) 11

Lee v. *Weisman*,
505 U.S. 577 (1992) 13

Li Hing of Hong Kong, Inc. v. *Levin*,
800 F.2d 970 (9th Cir. 1986) 19

Locke v. *Davey*,
540 U.S. 712 (2004) 13

Maryland v. *King*,
133 S. Ct. 1 (2012) (Roberts, C.J., in chambers) 34, 37

Massachusetts v. *EPA*,
549 U.S. 497 (2007) 16

Mathews v. *Diaz*,
426 U.S. 67 (1976) 29

McCreary Cty., Ky. v. *Am. Civil Liberties Union of Ky.*,
545 U.S. 844 (2005) 24, 27

McGowan v. *Maryland*
366 U.S. 420, 429 (1961) 18

Nat'l League of Cities v. *Brennan*,
419 U.S. 1321 (1974) (Burger, C.J., in chambers) 34

In re Navy Chaplaincy,
534 F.3d 756 (D.C. Cir. 2008) 15

Rostker v. *Goldberg*,
453 U.S. 57 (1981) 19

Ruckelshaus v. *Monsanto Co.*,
463 U.S. 1315 (1983) (Blackmun, J., in chambers) 33, 37

Saavedra Bruno v. *Albright*,
197 F.3d 1153 (D.C. Cir. 1999) 19

Sale v. *Haitian Centers Council, Inc.*,
509 U.S. 155 (1993) 29

Santa Fe Indep. Sch. Dist. v. *Doe*,
530 U S. 290 (2000) 13, 24, 38

Sch. Dist. of Abington Twp. v. *Schempp*,
374 U.S. 203 (1963) 13, 14

Stormans, Inc. v. *Wiesman*,
136 S. Ct. 2433 (2016) 25

Texas v. *United States*,
787 F.3d 733 (5th Cir. 2015) 35

Texas v. United States,
809 F.3d 134 (5th Cir. 2016) 40

Town of Greece v. Galloway,
134 S. Ct. 1811 (2014) 13, 18, 24

United States Dep't of Defense v. *Meinhold*,
510 U.S. 939 (1993) 39

United States v. *Witkovich*
353 U.S. 194, 199-202 (1957) 29

Valley Forge Christian Coll. v. *Ams. United for Separation of Church & State, Inc.*,
454 U.S. 464 (1982) 15, 16

Van Orden v. *Perry*,
545 U.S. 677 (2005) 13, 18

W. Va. State Bd. of Educ. v. *Barnette*,
319 U.S. 624 (1943) 23, 24

Washington v. *Seattle Sch. Dist. No. 1*,
458 U.S. 457 (1982) 27

Washington v. *Trump*,
2017 WL 1045950 (W.D. Wash. Mar. 16, 2017) 36

Washington v. *Trump*,
2017 WL 462040 (W.D. Wash. Feb. 3, 2017) 5

Washington v. *Trump*,
847 F.3d 1151 (9th Cir. 2017) 6, 38, 40

Whitman v. Am. Trucking Ass'n,
531 U.S. 457 (2001) 20

Wong Wing Hang v. *INS*,
360 F.2d 715 (2d Cir. 1966) 31

Zadvydas v. *Davis*,
533 U.S. 678 (2001) 29, 38

Zelman v. *Simmons-Harris*,
536 U.S. 639 (2002) 18

Zemel v. *Rusk*,
381 U.S. 1 (1965) 28

Constitution, Statutes, Regulations, and Executive Materials

U.S. Const. art. I, § 8, cl. 4 ..... 28, 39

8 U.S.C. § 1152(a)(1)(A) 32

8 U.S.C. § 1182(a)(3)(B) 30

8 U.S.C. § 1182(a) 31

8 U.S C. § 1182(a)(3)(B)(i)(II) 30

8 U.S.C. § 1182(f) ..... *passim*

8 U.S.C. § 1187(a)(12) 30

45 C.F.R. part 400 17

82 Fed. Reg. 20956 (May 4, 2017) 12

Proclamation No. 2523, 55 Stat. 1696 (Nov. 14, 1941) 29

Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017) ..... *passim*

Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) 4

9 FAM § 302.14-3(B) 31

H.R. Rep. No. 100-475 (1987) 30

Other Authorities

Barbara J. Van Arsdale et al., Federal Procedure, Lawyers Edition § 3:304, Westlaw (June 2017 Update) 11

Christine Wang, *Trump website takes down Muslim ban statement after reporter grills Spicer in briefing*, CNBC (May 8, 2017) 9

Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* (Jan. 23, 2017) 29

Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realdonaldtrump 10

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003) 22

Scott Johnson, *At the White House with Trump*, Powerlineblog.com (Apr. 25, 2017) 9

INTRODUCTION

Almost three months ago, the U.S. District Court for the District of Hawaii enjoined provisions of an Executive Order that would have banned millions of individuals from the United States. Had the Order gone into effect, it would have separated families, disturbed countless plans for international work, research, and study, and prevented thousands of persecuted individuals from finding a safe harbor in the United States. As a result, it would have forced respondent Dr. Elshikh and numerous other Muslim residents of the State of Hawaii to endure the absence of loved ones; it would have hurt the diversity and depth of talent in Hawaii's University and workplaces; and it would have done lasting damage to Hawaii's reputation as a place of welcome and refuge

These consequences, by themselves, are staggering. They are made worse by the near universal perception that the Order's travel and refugee bans were designed primarily to fulfill the President's unconstitutional campaign promise to enact a Muslim ban And they are made worse still by the fact that the President himself has cultivated that perception.

Our foundational text, the First Amendment, bars the Government from making a citizen's status in the political community dependent on his faith. The President unquestionably violates that command when he issues an Order that disproportionately burdens Muslim-Americans, while denigrating the Muslim faith and making it abundantly clear that the Order's harmful effect on Muslims is far from incidental. To date, the injunction has prevented that constitutional violation.

In doing so, it has safeguarded religious liberty and demonstrated the strength of our Constitution and the courts that protect it.

Nonetheless, the Government now asks this Court to stay the injunction, asserting an urgent need to implement the bans in order to avoid irreparable harm. But the Government's own actions belie this assertion. At every turn, the Government has opted to delay rather than accelerate judicial review: After the first Order was enjoined, the Government waited a month to introduce a revised Order, with some of that delay motivated by a desire to take advantage of a favorable news cycle. When the second Order, too, was enjoined, the Government eschewed any immediate appeal or even any request for a stay, instead spending weeks relitigating the issues before the District Court. And, when the Government finally did seek relief from the Ninth Circuit, it proposed a schedule that would virtually ensure that the court of appeals would not decide the Government's stay request before the merits. These are not the actions of a Government that believes the immediate implementation of its Order is necessary to avoid irreparable harm.

The Government offers no explanation for this profound disjunction between its call for urgency and its dilatory litigation conduct. Instead, the Government implicitly asks the Court turn a blind eye to the evidence that undermines its stay request, just as it explicitly asks the Court to ignore the evidence of an unconstitutional purpose that undermines the Order itself.

The Court should do neither. Staying the injunction would irreparably injure respondents and thrust the country back into the chaos and confusion that resulted

when the first Order was announced. The long term consequences would be even more significant. As soon as the unconstitutional Order is implemented, our Framers' greatest fears for this Nation will be realized; the Order will serve as an ominous "Beacon on our Coast, warning" the "persecuted and oppressed of every Nation and Religion" that they must "seek some other haven." *Engel* v. *Vitale*, 370 U.S. 421, 432 n.16 (1962) (quoting James Madison, Memorial and Remonstrance against Religious Assessments (June 20, 1785)).

The stay in this case should be denied. Likewise, the Government's request for a stay and certiorari in *Int'l Refugee Assistance Project ("IRAP")* v. *Trump*, Nos. 16-11A91 and 16-1436, should be denied. However, should the Court grant certiorari in *IRAP* v. *Trump*, respondents acquiesce in the Government's alternative request to grant certiorari before judgment so that the cases may be heard together.

STATEMENT

1. In December 2015, then-candidate Donald Trump made the exclusion of Muslims a core plank of his presidential campaign platform. He issued a public statement calling for "a total and complete shutdown of Muslims entering the United States." C.A. E.R. 59, 144 & S.E.R. 15, 156. When Mr. Trump was asked how this policy would be implemented at the border, he explained that the person seeking entry would be asked, "are you Muslim?," and "if they said 'yes,' they would not be allowed into the country." C.A. E.R. 145. In an interview on March 9, 2016, he explained his rationale: "I think Islam hates us * * *. [W]e can't allow people

coming into this country who have this hatred of the United States * * * [a]nd of people that are not Muslim." Stay Application Addendum ("Add.") 57.

While campaigning, Mr. Trump also decried the admission of Muslim refugees. As early as June 2015, he complained that "Islamic" refugees from Syria were being admitted to the United States, but "Christian" refugees were not. C.A. E.R. 144. In June 2016, he said his opponent would "admit[] hundreds of thousands of refugees from the Middle East" who would "try[] to take over our children and convince them * * * how wonderful Islam is." C.A. E.R. 146 n.19.

As the campaign progressed, Mr. Trump sometimes began to couch the "total and complete shutdown of Muslims" in different terms, characterizing it as a ban on immigration from countries "where there's a proven history of terrorism." C.A. E.R. 144. But when asked in July 2016 whether this approach represented a "rollback" of his Muslim ban, he disagreed: "In fact, you could say it's an expansion." C.A. E.R. 146. Mr. Trump explained, "I'm looking now at territories" because "[p]eople were so upset when I used the word Muslim. Oh, you can't use the word Muslim." C.A. E.R. 146-147. When asked on December 21, 2016, now as President-Elect, whether he had decided to "rethink" his "plans to create a Muslim registry or ban Muslim immigration," his answer was: "You know my plans." C.A. E.R. 147.

2. On January 27, 2017, seven days after taking office, President Trump signed Executive Order No. 13,769 (the "Order"), entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." 82 Fed. Reg. 8977 (Feb. 1,

2017). As he signed it, he read the title, looked up, and said: "We all know what that means." C.A. E.R. 148.

The first Order imposed an immediate, 90-day ban on entry by nationals of seven "overwhelmingly Muslim" countries. Add. 55, 69. The Order also suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days, lowered the cap on annual refugee admissions, and indefinitely barred Syrian refugees. Add. 70. The USRAP suspension included a targeted carve-out for refugees who were "religious minorit[ies]" in their home countries. *Id.* In an interview with the Christian Broadcasting Network on the day the Order was signed, President Trump explained that this latter provision was designed to "help" Christians, falsely asserting that in the past "[i]f you were a Muslim [refugee] you could come in, but if you were a Christian, it was almost impossible." C.A. E.R. 150.

One of President Trump's advisors was explicit about the relationship between the Order and the promised "Muslim ban." In a television interview the day after the Order was signed, Rudolph Giuliani recounted: "When [Donald Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally." C.A. E.R. 150-151.

The first Order spurred confusion and chaos. Over 100 individuals were immediately detained at U.S. airports, and the Government revoked 60,000 visas during the first week. C.A. E.R. 152-154. Numerous lawsuits were filed and within a week, a Washington district court enjoined the Order's enforcement nationwide. *Washington* v. *Trump*, 2017 WL 462040, at **2-3 (W.D. Wash. Feb. 3, 2017). The

Ninth Circuit denied the Government's request to stay the district court's injunction in a published, unanimous decision. 847 F.3d 1151, 1169 (9th Cir. 2017).

3. The Government did not appeal the Ninth Circuit's decision; instead, it decided to issue a "revised" Order. C.A. E.R. 155. In the words of President Trump's senior advisor, Stephen Miller—appearing in a television interview on February 21, 2017—the revised Order would "have the same basic policy outcome" as the first, and any changes would address "very technical issues that were brought up by the court." C.A. E.R. 156.

As the new Order was being prepared, the Department of Homeland Security ("DHS") issued internal memoranda severely undermining its purported national security rationale. For example, on February 24, 2017, a draft DHS report concluded that "country of citizenship" was an "unreliable indicator of terrorist threat[s] to the United States." C.A. S E.R. 158; *see also* C.A. E.R. 151.

Undeterred, the White House planned to release its revised Order on March 1, 2017, but delayed the announcement to avoid "undercut[ting] the favorable coverage" of President Trump's speech to Congress. C.A. E.R. 157. The Order was finally issued on March 6, 2017. Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017). As Mr. Miller had promised, its substance is largely unchanged from the first. Section 2(c) now bans nationals of six (rather than seven) overwhelmingly Muslim countries—specifically, countries whose Muslim populations range from 90.7% to 99.8%—from "entry into the United States" or being "issu[ed] a visa" for a period of 90 days. Order §§ 2(c), 3(c); Add. 55. Individuals who are present in the

United States on the Order's effective date or who already have been granted visas or lawful status are exempt; otherwise, nationals of the six countries may escape the ban only by obtaining a wholly discretionary, "[c]ase-by-case waiver." *Id.* § 3(a)-(c). The Order also instructs the Secretary of Homeland Security to conduct a "worldwide review" to determine whether the President's ban should be extended to "additional countries." *Id.* § 2(a)-(b), (d)-(g).

The Order retains the President's refugee ban, as well. Section 6(a) suspends all "travel of refugees into the United States" as well as all "decisions on applications for refugee status" for 120 days. Section 6(b) lowers the cap on refugees that may be admitted to the United States in 2017 from 110,000 to 50,000. Although the Order no longer contains an explicit preference for Christian refugees, it permits Administration officials to exempt and thus admit individuals as refugees "on a case-by-case basis, in their discretion." *Id.* § 6(c).

4. The issuance of the revised Order rekindled the numerous legal challenges that had been lodged against the first Order. Respondents, the State of Hawaii and Dr. Elshikh, had filed one of those suits against the original Order in the U.S. District Court for the District of Hawaii. Proceedings were stayed after that Order was enjoined, but the stay was lifted once the revised Order was announced.

On March 8, two days after the second Order was announced, respondents filed a Second Amended Complaint and a motion for a temporary restraining order ("TRO") barring implementation of the revised Order. On March 15, 2017, the District Court issued a TRO, enjoining the Government from "implementing

Sections 2 and 6 of the Executive Order across the Nation." Add. 66. The court found that both Plaintiffs had standing because each alleged "direct, concrete injuries" to their *own* interests: Hawaii demonstrated "two proprietary injuries stemming from" the Order's effects on its University and tourism economy, and Dr. Elshikh showed that the Order frustrates his ability to freely practice his religion, raise his children in the Muslim faith, and reunite with his own mother-in-law. Add. 41-45, 47-48. On the merits, the court found that "[a]ny reasonable, objective observer would conclude * * * that the stated secular purpose of the Executive Order is, at the very least, 'secondary to a religious objective' of temporarily suspending the entry of Muslims." Add. 60. The court "expresse[d] no view on Plaintiffs' due-process or INA-based statutory claims." Add. 53 n.11.

After a second hearing, on March 29, 2017, the court granted respondents' motion to convert the TRO into a preliminary injunction. The court reaffirmed respondents' standing and the Establishment Clause violation, and again reserved the statutory and Due Process questions. Add. 8-17. The court also declined to narrow the scope of the injunction, explaining that "the *entirety* of the Executive Order runs afoul of the Establishment Clause" and, in any event, the Government had "fail[ed] to provide a workable framework for narrowing the scope of the enjoined conduct." Add. 20-22 (emphasis added). The court also noted the Government's own concession that "'an internal review of [vetting] procedures obviously can take place independently of the 90-day suspension-of-entry provision." Add. 22 (citing Gov't Mem. in Opp'n to Prelim. Inj. 28).

The Government appealed the District Court's preliminary injunction and moved for a stay pending appeal. The Government did not ask for an immediate ruling on the stay. Instead, it proposed a month long briefing schedule under which the stay and the merits briefing would occur simultaneously.

On May 15, 2017, a panel of the Ninth Circuit heard oral argument. The panel has not yet ruled on the stay request or on the merits. Nevertheless, on June 2, the Government asked this Court to issue a stay of the District Court's injunction, claiming urgency as a result of the Fourth Circuit's ruling.

5. Throughout these judicial proceedings, the President has continued to make generalized, often inflammatory, statements about the Muslim faith and its adherents. On the night that his revised Order was enjoined, President Trump publicly reiterated his view that it is "very hard" for Muslims to assimilate into Western culture. C.A. S.E.R. 95. Several weeks later, at a White House gathering for conservative media outlets, he said that Muslim refugees had been favored over Christians, and that his Administration would help the Christians.[1] And, until minutes before the oral argument in the related Fourth Circuit proceedings, President Trump's regularly-updated campaign website continued to feature his campaign statement calling for a "total and complete shutdown of Muslims entering the United States."[2] *See* C.A. E.R. 156.

The President has also expressed skepticism of the revised Order, his legal

---

[1] Scott Johnson, *At the White House with Trump*, PowerlineBlog.com (Apr. 25, 2017), goo.gl/ZeXqhY.

[2] Christine Wang, *Trump website takes down Muslim ban statement after reporter grills Spicer in briefing*, CNBC (May 8, 2017), goo.gl/j0kpAi.

strategy, and the courts themselves. Just hours after the Hawaii District Court issued its nationwide injunction, the President complained to a rally of his supporters that the new Order was just a "watered down version of the first one" and had been "tailor[ed]" at the behest of "the lawyers." C.A. S.E.R. 84. He added: "I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first place." C.A. S.E.R. 84. In addition, he called the District Court's opinion a "terrible ruling" done "for political reasons," and criticized the "much overturned Ninth Circuit Court." C.A. S.E.R. 82-84.

On June 5, 2017, days *after* the Government filed its stay application in this Court, President Trump echoed these sentiments in a series of Twitter posts championing the "original Travel Ban." He decried how the "Justice Dep[artment]" had submitted a "watered down, politically correct version * * * to S.C." He urged the Justice Department to seek "an expedited hearing of the watered down Travel ban before the Supreme Court," and to "seek [a] much tougher version." Finally, he claimed that "[t]he courts are slow and political," but that his Administration was already "EXTREME VETTING people coming into the U.S."[3]

ARGUMENT

The Government is not entitled to the extraordinary remedy of a stay from this Court. The Supreme Court "rarely grant[s]" a stay before the lower court has decided the merits, *INS* v. *Legalization Assistance Project*, 510 U.S. 1301, 1302

---

[3] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, posts uploaded between 6:25 A.M. E.S.T. and 6:44 A.M. E.S.T.), https://twitter.com/realdonaldtrump.

(1993) (O'Connor, J., in chambers), and it almost always denies a stay when the lower courts have not yet ruled on that request. *See, e.g.*, *Krause* v. *Rhodes*, 434 U.S. 1335, 1335-36 (1977) (Stewart, J., in chambers); *see also* Barbara J. Van Arsdale et al., Federal Procedure, Lawyers Edition § 3:304, Westlaw (June 2017 Update) ("While an application for a stay is pending in the lower court, a similar application will normally be denied by the Supreme Court Justice."). There is no reason to depart from that practice here. That is particularly so because granting the Government's stay and hearing the case in October, as the Government requests, would effectively grant the Government a victory on the merits. Absent the injunction, the Government will have imposed the full travel ban and most of the refugee ban before the October Term begins.

The timing of the request, however, is the least of the Government's problems. In order to obtain a stay, the Government must demonstrate both that the Court is likely to vacate the injunction, and that the harm the Government will suffer absent a stay outweighs the harm a stay will inflict on respondents and the public. The weakness of the Government's case makes that impossible. *See, e.g.*, *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers).

I. THIS COURT IS UNLIKELY TO VACATE THE INJUNCTION

As a preliminary matter, it is doubtful that the Court will even grant review in this case. Respondents do not dispute the fundamental importance of the underlying legal issues, which involve the breadth of religious freedom and the statutory and constitutional limits on Executive power. The underlying facts,

however, suggest that review is unnecessary. The President first asserted a need for an immediate, temporary ban almost five months ago, explaining that the ban would facilitate a review and upgrade of the country's immigration vetting procedures. In May, the Government published a notice in the Federal Register, announcing improvements to the vetting procedures worldwide. *See* 82 Fed. Reg. 20956 (May 4, 2017). And, even after this stay application was filed, the President confirmed that the country was already engaged in "EXTREME VETTING." *See supra* p. 10 & n.3. Thus, by the Government's own account, the need for the travel and refugee bans has passed. It would be unnecessary and wasteful for this Court to grant review of an issue that is effectively moot. *See also infra* pp. 35-37 (explaining that the existing injunctions do not prevent an upgrade of the vetting procedures).

Further, if the Court does grant review, it is extremely unlikely to vacate the injunction. The Government's argument to the contrary relies primarily on its assertion that the lower court should not have reached the constitutional question, either because the challenge is not justiciable or because courts must apply a highly deferential standard of review. The Government is wrong on both counts. On the merits, the injunction must be sustained both because the Order is plainly unconstitutional and because it exceeds the President's statutory authority.

A. The Challenge To The Order Is Justiciable.

The Government first alleges that the injunction will be overturned because this case is not justiciable. But there is no obstacle to judicial review. Dr. Elshikh

and the State of Hawaii both have standing, and the so-called "doctrine of consular unreviewability" is inapplicable.

1. Dr. Elshikh Has Standing.

a. Because of the Constitution's core protections for religious freedom, a policy that demeans or denigrates a person's faith necessarily inflicts an "important * * * constitutional injur[y]." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S 290, 292 (2000). Thus, at least when a government establishment of religion "directly affect[s]" a person, the resulting spiritual or dignitary harm confers standing. *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963); *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 157 (1970). Indeed, "[t]he indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial." *Locke* v. *Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting).

Accordingly, this Court has found standing even with respect to Establishment Clause injuries that might appear slight. For example, the Court has indicated that observing a "benediction" at one's high school graduation, *Lee* v. *Weisman*, 505 U.S. 577, 584-85 (1992), "encounter[ing]" the Ten Commandments on "Capitol grounds," *Van Orden* v. *Perry*, 545 U.S. 677, 682-83 (2005) (plurality op.), and taking "'offens[e]'" at a prayer during a "town board meeting[]," *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1817 (2014), are all injuries sufficient to give rise to standing.

b. Under these principles, Dr. Elshikh's standing is obvious. The Order, which is widely perceived as a Muslim ban, denigrates and demeans Dr. Elshikh's faith. It has therefore "devastat[ed]" Dr. Elshikh, his family, and his mosque. C.A. E.R. 94, 96, 161-162. And the religious discrimination embodied in the Order "directly affect[s]" Dr. Elshikh in several ways. *Schempp*, 374 U.S. at 224 n.9.

First, the Order directly impedes Dr. Elshikh's ability to reunite his family. Dr. Elshihk's mother-in-law is a Syrian national seeking an immigrant visa. C.A. E.R. 94-95. She had a consular interview last month at the U.S. Embassy in Lebanon, and received a letter dated May 24, 2017, informing her that her visa application "requires administrative processing," which "takes an average of 60 days."[4] The travel ban, if it goes into effect, would block her entry into the United States. This injury alone is sufficient to confer standing, even independent of the dignitary harm Dr. Elshikh has suffered. And the Government is incorrect that this injury is unripe because Dr. Elshikh's mother-in-law might receive a waiver. The process of seeking a waiver would undoubtedly prolong the family separation, and, in any event, "denial of equal treatment resulting from the imposition of [a] barrier" is itself an injury, regardless of whether it results in the "ultimate inability to obtain [a] benefit." *Gratz* v. *Bollinger*, 539 U.S. 244, 262 (2003).

Second, Dr. Elshikh is directly affected because he is the imam of a mosque whose religious community is damaged by the Order. Because the Order casts opprobrium on Muslims, it engenders feelings of fear and condemnation in the

[4] Because this letter was received so recently, it is not yet in the record. If the Court desires, respondents can lodge a copy under Supreme Court Rule 32.3.

members of Dr. Elshikh's mosque. C.A. E.R. 96; 131-132. Moreover, at least one current member of Dr. Elshikh's mosque is a refugee, and the community is generally enriched by the presence of refugees worshipping there. Br. of *Amicus Curiae* Dr. Ismail Elshikh at 11, *IRAP* v. *Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 146-1; C.A. E.R. 131-132. If the Order is implemented, Dr. Elshikh will be the spiritual leader of a denigrated and diminished religious community.

c. The Government suggests that these harms to Dr. Elshikh are not cognizable because they do "not result from any alleged discrimination against *him*." Appl. for Stay Pending Appeal at 22 ("Stay Appl."). That is simply not true. The Order discriminates directly against Dr. Elshikh by denigrating the faith *he* professes, by excluding *his* mother in law, and by harming *his* mosque and its members. In other words, by targeting Muslims for exclusion, the Order "denie[s] equal treatment" to Dr. Elshikh himself. *See Allen* v. *Wright*, 468 U.S. 737, 755 (1984) (citation omitted).

Finally, the Government attempts to dismiss Dr. Elshikh's injury by alleging that it is comparable to the one this Court held insufficient in *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). That fundamentally misunderstands Dr. Elshikh's harm in two ways. *First*, in *Valley Forge*, the plaintiffs challenged a land transfer that gave preference to a religious group. *Id.* at 468; *see also In re Navy Chaplaincy*, 534 F.3d 756, 760 (D.C. Cir. 2008) (challenge to retirement system that "favor[ed] Catholic chaplains"). There is a marked difference between challenging a government action

that confers a benefit on someone else (which is at best a generalized grievance shared by all who do not receive the preference), and Dr. Elshikh's challenge to an Order that imposes burdens on himself (which is the kind of direct, personalized injury that traditionally supports standing). *Second*, the plaintiffs in *Valley Forge* alleged that they experienced "psychological" harm from "the observation of conduct with which [they] disagree[d]." 454 U.S. at 485. Dr. Elshikh's injury is not that he simply "disagrees" with the Order; it is that the Order condemns his faith and harms his family and his mosque.

2. Hawaii Has Standing.

Hawaii, too, has standing to challenge Sections 2 and 6 of the Order, particularly in light of the "special solicitude" States receive "in the standing analysis." *Massachusetts* v. *EPA*, 549 U.S. 497, 520 (2007).

a. First, Hawaii has standing because of the harm to its ability to recruit and retain faculty and students from overseas. The University of Hawaii has 23 graduate students, multiple faculty members, and 29 visiting faculty from the six designated countries. C.A. E.R. 120-121. The University has made fourteen offers of admission to graduate students located in the six countries targeted by the Order, and three of those students have accepted their offers of admission. Second Suppl. Decl. of Risa E. Dickson ¶¶ 3-5, C.A. Dkt. No. 307-2. One of those three students must be on campus by August 1, 2017, and another must be on campus by August 10, 2017. *Id.* ¶ 7. Classes begin on August 21, 2017. *Id.* ¶ 6. If the Order goes into

effect, those students will be unable to matriculate, and the University will lose the tangible and intangible benefits that their enrollment would have conferred.

Second, Hawaii will lose tax revenue as a result of the drop in tourism. *See Bank of Am. Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1303 (2017) ("lost tax revenue" is an Article III injury). As the District Court found, "preliminary data" suggests that during the short period of time that the first Executive Order was in place, the number of visitors to Hawaii from the Middle East fell. Add. 10, 44-45. More recent numbers on the Hawaii Tourism Authority's website confirm this trend. C.A. Answering Br. at 20 n.6 (citing *Visitor Arrivals from Middle East & Africa*, Hawaii Tourism Authority, goo.gl/tM6krh). That financial harm alone is more than sufficient to establish standing. *See Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("[E]ven a small amount of money is ordinarily an 'injury.'").

Third, the Order prevents the State from resettling refugees within its borders. C.A. E.R. 166. Hawaii has already accepted three refugees this year, and it intends to accept more. *See* Decl. of Lawrence E. Bartlett, C.A. E.R. 165-166. Refugees pay taxes and contribute to Hawaii's economy. Moreover, by blocking the admission of refugees, the Order deprives the State of financial assistance it would otherwise receive from the Federal Government for each refugee it admits. 45 C.F.R. part 400. And by preventing the State from carrying out its resettlement program, the Order inflicts a concrete injury on the State as sovereign.

Finally, Hawaii has standing because the Order effects a federal establishment of religion. A core function of the Establishment Clause is to

"protect[] *States* * * * from the imposition of an established religion by the Federal Government." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) (emphasis added); *Van Orden*, 545 U.S. at 731 n.32 (Stevens, J., dissenting, joined by Ginsburg, J.). The Clause has long protected the sovereign right of states to include protections for religious freedom within their state constitutions. *Town of Greece*, 134 S. Ct. at 1836 (Thomas, J., concurring) ("the decision to establish *or disestablish* religion was reserved to the States" (emphasis added)). Hawaii's Constitution contains such a provision, C.A. E.R. 141, 163-164; if the Order goes into effect, it will undermine that guarantee and inflict precisely the sort of injury the Establishment Clause was created to prevent.

b. The Government's main response (at 21) is to dispute whether the State's proprietary injuries are themselves sufficient to create standing. That is beside the point, given the direct harms the Order inflicts on the State's sovereign interests. In any event, the Government is wrong. In *McGowan* v. *Maryland*, plaintiffs "allege[d] only economic injury to themselves" without "any infringement of their own religious freedoms." 366 U.S. 420, 429 (1961). While that was not enough to make out a *free exercise* claim—the only part of the opinion cited by the Government here (at 22)—it *was* enough for Establishment Clause standing. That was because the Framers "feared" an "establishment of religion" not just because it would interfere with religious exercise but "because of its tendencies to political tyranny and subversion of civil authority." *McGowan*, 366 U.S. at 430.

3. The Order Is Otherwise Reviewable.

The Government also claims (at 20) that the "doctrine of consular nonreviewability" blocks judicial review of the Order. This Court has never embraced that doctrine, but, even as articulated by lower courts, the doctrine has no application here. Plaintiffs are not challenging an individual consular decision. *Cf. Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999); *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d 970, 971 (9th Cir. 1986). They are challenging a broad policy that injures American citizens and States. This Court has not hesitated to review Government actions involving the issuance and denial of visas when the rights of Americans are implicated. *Kerry* v. *Din*, 135 S. Ct. 2128 (2015); *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972). Moreover, the Government's assertion of consular nonreviewability would mean that even an Executive Order *expressly* banning all Muslims from the country, or banning all members of a particular race, would be entirely insulated from judicial review. That simply cannot be. While deference to the political branches in the arena of immigration is appropriate, "deference does not mean abdication." *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981).

B. The Order Violates The Establishment Clause.

Even when it reaches the merits, the Government's primary argument is that the injunction must be vacated because courts should not engage in any meaningful analysis of the Order's constitutionality. The Government urges that the Order must be upheld because it has asserted a "facially legitimate and bona fide" rationale for the bans. *Mandel*, 408 U.S. at 770. That is incorrect.

1. *Mandel* Does Not Exempt The Order From Meaningful Constitutional Review.

a. According to the Government, courts must evaluate the Order under the highly deferential standard of review announced in *Mandel*, a case involving an individual exclusion decision. This argument suffers from the same defect as the Government's assertion of consular nonreviewability: It assumes the deference owed to an Executive's decision to exclude an individual alien is equally applicable to a sweeping Executive policy excluding millions of aliens. That is a dubious proposition, given that the Court has long distinguished between the nearly absolute deference required for exercises of prosecutorial discretion and the far more limited deference owed to broad Executive Branch policymaking. *See, e.g. Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 475 (2001) ("[T]he degree of * * * discretion that is acceptable varies according to the scope of the power congressionally conferred.").

b. More importantly, the Order cannot pass muster even under *Mandel*. In *Mandel*, the Court declined to consider the constitutionality of an Executive decision in the immigration context because the Government had offered a "facially legitimate and bona fide" rationale for its exercise of discretion. 408 U.S. at 770. The Government attempts to read the words "bona fide" out of the opinion, urging that the *Mandel* standard is met whenever it offers a plausible rationale that the challenged policy *could* serve. But *Mandel* listed two requirements, not one. Even when the Government has offered a "facially legitimate" reason for an immigration decision, the Court must still conduct a more thorough review of the

constitutionality of the policy if the plaintiff is able to make "an affirmative showing of bad faith." *Din*, 135 S. Ct. at 2140-41 (Kennedy, J., concurring in the judgment).

Here, Plaintiffs are easily able to make that showing. There is a mountain of extrinsic evidence, mostly in the form of statements by the President himself, indicating that the stated rationale is a sham. That includes multiple public statements from Candidate Trump describing Islam in general and Muslim refugees in particular as a threat, and a formal, published campaign statement calling for a complete ban on Muslim immigration. It also includes statements by the Candidate explaining that—in response to criticism—he has decided to stop talking "Muslim" and start talking "territory," as well as his clarification that this is not a "roll back" but, if anything, an "expansion" of his promised Muslim ban. And it includes numerous post-inauguration statements in which the President has emphasized that he is fulfilling his campaign promises, admitted a desire to favor Christian refugees over Muslims, and acknowledged that the current Order is largely an attempt by his lawyers to "water[-]down" the travel ban he originally proposed in order to make it "politically correct." *See supra* p. 10.

c. The Government contends that *Mandel* requires courts to ignore *all* of this evidence In its view, so long as the policy set out within the four corners of the Order passes rational basis review, the Court may not even begin to "test" or "balanc[e]" the policy against the constitutional rights of United States citizens. Stay App. 26 (quoting *Mandel*, 408 U.S. at 770). That is a remarkable proposition. It means that a President may adopt any facially neutral policy that *could* serve a

national security interest, even if he has admitted that he is actually pursuing an unconstitutional aim. For example, as the Government has acknowledged, under its reading of *Mandel*, the President may announce a desire to ban Jews, and then bar all immigration from Israel by citing national security concerns. Oral Arg. at 1:55:20 to 1:58:00, *IRAP* v. *Trump*, No. 17-1351 (4th Cir. May 8, 2017).

That admission alone demonstrates why the Government's position is untenable, particularly given that the Founders recognized that excluding immigrants of a dissenting faith was a prime means of establishing a religion. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2116-17 (2003). And it is not only the freedom of religion that is threatened by the Government's view of *Mandel*. Presidents could enact policies designed to further almost any unconstitutional aim by cloaking the policy in neutral terms and a national security rationale. A white nationalist could call for a whiter America, and then bar immigrants from Africa. An anti-gun activist could call for a halt on gun ownership, and then bar all imports from the countries that make gun components. So long as the Executive could offer a facially legitimate reason for each of these actions, courts would be powerless to intervene.

That is not the law. The Government's primary source for its view is a misguided analysis of the *Mandel* dissent. Specifically, the Government alleges (at 27) that the *Mandel* majority implicitly rejected any consideration of extrinsic evidence that a neutral rationale is shielding an unconstitutional purpose, because

Justice Marshall unsuccessfully urged a review of such evidence in his *Mandel* dissent. That is wrong.

In *Mandel*, there was *no* comparable evidence that the Executive had an unconstitutional ulterior motive for its action. The *Mandel* plaintiffs challenged the Executive's decision to deny a waiver of exclusion to a "revolutionary Marxist" professor. 408 U.S. at 756. The plaintiffs did not dispute that, without a waiver, the professor would be excluded under a statutory bar on the admission of communists. And they conceded the constitutionality of that statutory bar. *See id.* at 767. Their *only* claim was that the Executive's stated reason for denying the waiver was not sufficiently compelling to justify the harm to their First Amendment rights that would occur if the waiver was denied. *See id.* at 768-69.

Thus, when Justice Marshall invited his colleagues to "peek" behind the Government's stated rationale, he meant that they should analyze the facts on the ground to determine whether they really supported a need to exclude the professor. *Id.* at 778 (Marshall, J., dissenting). And his colleague's decision to decline that invitation signified nothing more than general judicial reluctance to second guess the foreign policy analysis of the political branches. That is very different from holding that a Court must ignore a mountain of evidence that the asserted rationale is mere camouflage for an unconstitutional purpose.

For that reason, at least in the face of an "affirmative showing of bad faith" like the one here, courts must be permitted to look behind a national security rationale in order to consider the constitutionality of an Executive Order. *See W.*

Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 637, 640 (1943) (explaining that the prohibition on government actions that make an "enemy of any * * * creed" applies even when the Government invokes a "national security" rationale).

2. The Establishment Clause Forbids The President From Enacting A Thinly Veiled Muslim Ban.

Once the Government's protestations of unreviewability are swept aside, there can be no doubt that the Order is unconstitutional. Under the Establishment Clause, the Government cannot "denigrate * * * religious minorities," "signal disfavor" toward a faith, or "suggest that [one's] stature in the community [is] in any way diminished" because of one's religion. *Town of Greece*, 134 S. Ct. at 1823, 1826. The Order runs afoul of those commands because an objective observer would conclude that its primary purpose is to fulfill the President' campaign promise to impose a "Muslim ban." *See McCreary Cty., Ky.* v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005).

The voluminous extrinsic evidence from both before and after the President's inauguration is virtually dispositive in and of itself. *See supra* pp. 3-6, 9-10. And that evidence is reinforced by the operation of the Order and the Government's own conduct since the Order was enjoined. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308. For example, the Order purports to pause immigration from certain Muslim-majority countries in order to give the President time to review vetting procedures. But the Order applies to nationals of the targeted countries, regardless of whether they currently live in a country with excellent vetting procedures. And it does not apply at all to long-term residents of the targeted countries who are not nationals.

Meanwhile, the Order pauses *all* refugee admissions worldwide, but cites only two examples of terrorist attacks attempted by refugees, one of which involves a refugee who entered the country as a toddler. And, while the Order asserts that both the travel and the refugee bans are necessary to prevent dangerous individuals from entering the country under the allegedly inadequate vetting procedures that are currently in place, the Government has readily agreed to permit the ban to remain enjoined until at least October in the event its stay request is denied.

A reasonable observer confronted with these facts, in the context of the numerous public statements from the President and his Administration, would inevitably conclude that the asserted neutral purposes of the Order are at best secondary and that the real aim is the enactment of a policy that is as close to the President's promised Muslim ban as possible. *See Edwards* v. *Aguillard*, 482 U.S. 578, 594 (1987) (finding an Establishment Clause violation where the "primary purpose" was religious, notwithstanding that the act's stated purpose was secular).

The Government tries to discourage this Court from that conclusion, observing that the policy does not ban *all* Muslims, and that it bans some *non*-Muslims. But the President may not evade allegations of religious discrimination by being over or under inclusive in his exclusions. So long as an objective observer would conclude that the President targeted this set of countries and refugees in general as an (albeit imperfect) means of excluding Muslims, an Establishment Clause violation has occurred. *See, e.g.*, *Stormans, Inc.* v. *Wiesman*, 136 S. Ct. 2433, 2437-38 (2016) (Alito, J., dissenting from denial of certiorari) (discriminatory intent

suggested where "the effect of the regulations in their real operation" meant that "the burden they impose" fell "almost exclusively on those" of particular faiths).

The Government also warns (at 30-31) that doubting the Order's stated rationale will embroil the courts in "judicial psychoanalysis" and endanger executive privilege. Hardly. The Establishment Clause inquiry turns on the apparent purpose and effects of a policy, not what is contained in the President's heart of hearts. The President's actual views towards Islam are irrelevant. What matters are his numerous public statements suggesting that Muslims are dangerous and should be excluded from this country, and his repeated suggestions that this Order is designed to further that goal. *See Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) ("There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct."); *Edwards*, 482 U.S. at 595 (considering an act's "historical context" and "the specific sequence of events leading to [its] passage").

Nor does the District Court's consideration of the President's campaign statements somehow throw open the doors to judicial examination of every ill-considered statement made on the campaign trail and later retracted. The statements here were repeated, and they were public. There was no pre- or even *post*-inauguration retraction. To the contrary, the statement calling for a complete shutdown of Muslim immigration remained on the President's frequently updated campaign website until minutes before the Fourth Circuit oral argument. Whether campaign statements lacking some or all of these features would be probative is a

question on which reasonable minds might disagree; whether *these* campaign statements are probative is not. *Cf. Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982) (discussing ballot initiative campaign statements in equal protection challenge).

Finally, recognizing that this policy is unconstitutional does not mean that the President is forever barred from enacting policies that have a disparate impact on Muslims. *See McCreary*, 545 U.S. at 873-74 ("[W]e do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter."). As long as a rational observer would view the primary purpose of the policy as neutral, the President will encounter no judicial obstacle. Indeed, if the President had not used the first Order's public signing ceremony, numerous public interviews and speeches, and his Twitter account to make a series of barely veiled statements linking the Orders to his promised Muslim ban, this Order might have passed constitutional muster. And, even now, if the President were to publicly disavow his prior statements calling for a Muslim ban, and if he were to engage with Congress and the Administration in order to develop a response to the perceived national security threats, he would almost certainly be free to enact the resulting policy. The presumption of regularity remains; but the President must do something to demonstrate that he is entitled to it. *See id.* at 874 ("[A]n implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.").

C. The Order Exceeds The President's Authority Under § 1182(f).

The injunction may also be sustained for an alternate reason: The Order exceeds the President's statutory authority. Section 1182(f) authorizes the President to "suspend the entry" of "any class of aliens" whose entry he "finds * * * would be detrimental to the interests of the United States." This provision is broad, but it does not permit the President to ignore the limits contained in the text and structure of the immigration laws.

1. The President May Not Use General Grants Of Authority To Override Carefully-Reticulated Statutory Schemes.

It is a bedrock principle of statutory interpretation that statutes "must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The Executive may not use general grants of authority "to circumvent [a] carefully constructed statutory scheme." *Honeycutt* v. *United States*, No. 16-142, slip op. at 9 (U.S. June 5, 2017). Nor may he "transform the carefully described limits on [his] authority * * * into mere suggestions." *Gonzales* v. *Oregon*, 546 U.S. 243, 260-261 (2006).

The Court has stressed, in particular, that facially broad immigration statutes must be read in harmony with the INA as a whole. In the immigration context Congress "must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965). But "[t]his does not mean that * * * it can grant the Executive totally unrestricted freedom of choice." *Id.*; *see* U.S. Const. art. I, § 8, cl. 4. Accordingly, the Court has

often "read significant limitations into *** immigration statutes." *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001). In *United States* v. *Witkovich*, for instance, the Court held that the Executive's seemingly "limitless" authority to demand information of aliens was "restrict[ed]" to requests consistent with the "legislative scheme." 353 U.S. 194, 199-202 (1957); *see also, e.g.*, *Zemel*, 381 U.S. at 17-18.

These principles apply with full force to §1182(f). Congress enacted this statute to codify emergency restrictions that the President initially imposed during World War II. *See* Proclamation No. 2523, 55 Stat. 1696 (Nov. 14, 1941). Since then, Presidents have invoked it to bar narrow classes of aliens during exigencies Congress had not addressed. *See* Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* 6-10 (Jan. 23, 2017), goo.gl/aTGqzC. For that reason, §1182(f) is best read as a grant of power that the Executive may use to manage an emergency, or to otherwise ameliorate a foreign policy crisis to which Congress has not yet responded. That understanding is consistent with this Court's recognition that the Executive may wield broader immigration authority during a time or war or national emergency, *see United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 546 (1950), or when swift action is needed to respond to rapidly changing circumstances, *see Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976).

But nothing in the provision's text or history, and nothing in this Court's precedent, suggests that §1182(f) can be used by the President to override the statutory scheme in response to circumstances for which Congress has already legislated. On the contrary, in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155

(1993), the Court carefully scrutinized an §1182(f) order to ensure it complied with "the text and structure of the [INA]." *Id.* at 171, 187.

2. The Order Repeatedly Subverts Existing Statutory Authority.

Under these principles, the Order cannot survive. Without pointing to any national emergency, or any changed circumstances at all, the President has invoked §1182(f) to nullify the INA's carefully constructed terrorism bar, subvert its structure, ignore the limits in §1182(f) itself, and contradict express text.

a. Section 1182(a)(3)(B) "establish[es] specific criteria for determining terrorism-related inadmissibility." *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment). In "10 different subsections" that "cover a vast waterfront of human activity," this "complex provision" prescribes precisely when aliens may be excluded as terrorists. *Id.* at 2145-46 (Breyer, J., dissenting). That enumeration is exclusive; indeed, Congress enacted these specific rules precisely to bar the Executive from using terrorism as pretext to discriminate "on the basis of [an alien's] expression of beliefs." H.R. Rep. No. 100-475, at 163 (1987) (Conf. Rep.).

The Order flouts those limits. It excludes 180 million aliens as potential "foreign terrorists" because they were born in particular countries or seek refugee status. Order § 2(c); *see also id.* §§ 1(a), (f), 6(a). Section 1182(a)(3)(B), however, authorizes aliens to be excluded as terrorists only if, among other things, there is a "reasonable ground to believe [the alien] is engaged in or is likely to engage after entry in any terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(i)(II). The Order does not attempt to make that or any other statutory showing.

Nor does the Order purport to address a particular terrorism-related exigency that Congress did not consider. In December 2015, Congress debated the same issues the Order identifies and responded by requiring nationals from the covered countries to obtain visas. *See* Pub. L. No. 114-113, div. O, § 203 (codified at 8 U.S.C. § 1187(a)(12)). That statute reflects a considered judgment that visa-screening procedures are sufficient; the Order renders that tailored solution superfluous.

b. The Order is also irreconcilable with the structure and policies of the immigration laws. The modern immigration scheme rests on the principle that an alien's admissibility must be based on his own "fitness to reside in this country," *Judulang* v. *Holder*, 565 U.S. 42, 53 (2011), not on "invidious discrimination" based on the alien's "race or group," *Wong Wing Hang* v. *INS*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.). Congress decisively eliminated such considerations when it repealed the national origins quota system in 1965. *See IRAP* v. *Trump*, No. 17-1351, slip op. at 121-124 (4th Cir. May 25, 2017) (Wynn, J., concurring). Every ground for inadmissibility now turns on an alien's *own* conduct or qualities, not those of a group to which he belongs. 8 U.S.C. § 1182(a). And nationality and race-based discrimination are particularly disfavored in light of Congress's affirmative decision to eschew the use of such criteria. *Wong Wing*, 360 F.2d at 719.

By its plain terms the Order violates this principle. It invokes a facially neutral provision, §1182(f), to ban nationals of six countries and all refugees because a handful have been suspected of terrorism. Order § 1(d), (f), (h). This inference—"that examples of individual disloyalty prove group disloyalty"—is the

essence of "discriminat[ion]." *Korematsu* v. *United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting). Nothing in the immigration laws sanction it. Nor has any prior President attempted it; every prior §1182(f) order has turned on an alien's own "objectionable conduct" or "affiliation[s]." 9 FAM § 302.14-3(B); *see IRAP*, slip op. at 124-25 n.11. (Wynn, J., concurring). Absent an overriding exigency, the immigration laws do not authorize this sort of undifferentiated dragnet ban.

c. For much the same reason, the President has also failed to comply with §1182(f) itself. That provision demands at least some rational basis for the "find[ing] that the entry of" the prohibited class of aliens "would be detrimental to the interests of the United States." 8 U S.C. § 1182(f); *see IRAP*, slip op. at 87 (Keenan, J , concurring). The Order justifies its ban solely by pointing to "conditions in the[] [covered] countries." Order § 1(d). Yet while those conditions might warrant limits based on *residence or travel*, they have no logical link to an alien's *nationality*. Order § 1(d); *see* Add. 61 (Order would "bar[] entry by a Syrian national who has lived in Switzerland for decades"). Likewise, the Order does not give any reason why *all* refugees *worldwide* would pose a threat "to the interests of the United States." And the President's extensive statements strongly indicate that the Order's "find[ings]" are a sham designed to disguise its unlawful purpose.

d. Finally, in many of its applications the Order contradicts express statutory text. Section 1152(a)(1)(A) provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's *** nationality." This specific, later-in-time statute plainly bars the

use of §1182(f) to deny the "issu[ance] of [immigrant] visa[s]" based on nationality. Order § 3(c). And it likewise prohibits the President from denying visas any *effect* because the visa-holder is the national of a banned country. *Id.* § 2(c). The Government has no plausible response; it has simply added a flagrant violation of the statute's text to its otherwise unlawful Order.

II. THE EQUITIES WEIGH AGAINST STAYING THE INJUNCTION.

Even if there were any chance that this Court would vacate the injunction, a stay would still be inappropriate because the Government has not demonstrated any necessity to upset a status quo that has existed for decades. "[T]he maintenance of the status quo is an important consideration in granting a stay," and "here it can be preserved only by denying one." *Dayton Bd. of Educ.* v. *Brinkman*, 439 U.S. 1358, 1358–59 (1978) (Rehnquist, J., in chambers)). Yet the Government devotes a mere *two* pages of its application to its attempt to show that it will be irreparably harmed unless the status quo is upended. That attempt fails.

Perhaps most notably, the Government no longer contends—as it did before the lower courts—that leaving the District Court's injunction in place will subject the Nation to imminent security risks. The Government offers no reason for this shift, but its own dilatory litigation tactics indicate that its current position more accurately reflects its sense of national security urgency. *Ruckelshaus* v. *Monsanto Co.*, 463 U.S. 1315, 1317-18 (1983) (Blackmun, J., in chambers) (the Government's "failure to act with greater dispatch tends to blunt [its] claim of urgency and counsels against the grant of a stay."). Indeed, the 90-day period specified in the

first Executive Order has long passed, and the 90-day period for the second Order expires this week.

Whatever the case, the Government now relies almost exclusively on its claim that it is suffering an irreparable injury simply because a court has enjoined an Order issued by the President. The Government cites *Maryland* v. *King* for that proposition. 133 S. Ct. 1 (2012) (Roberts, C.J., in chambers). But that case involved an injunction of a state DNA collection program that had existed for years and led to scores of criminal convictions. 133 S. Ct. at 3. Those facts are hardly analogous to the Government's instant claim of irreparable harm from the injunction of an Executive Order that has never been enforced and would dramatically alter the existing immigration landscape.

In a series of cases that *are* directly on point, this Court has repeatedly refused to grant a stay merely because a lower court has enjoined a federal statute or executive action. *See, e.g.*, *Ruckleshaus*, 463 U.S. at 1315 (denying EPA's request to stay an order enjoining enforcement of portions of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")); *Commodity Futures Trading Comm'n* v. *British Am. Commodity Options Corp.*, 434 U.S. 1316, 1320 (1977) (Marshall, J., in chambers) (declining Government's request to stay an injunction of a new regulation). The Court has thereby recognized the wisdom of preliminarily enjoining federal actions that will significantly alter the status quo. *See Nat'l League of Cities* v. *Brennan*, 419 U.S. 1321, 1322 (1974) (Burger, C.J., in chambers), (issuing an injunction of amendments to the Fair Labor Standards Act pending

appeal, and noting among other things the "pervasive impact" the amendments would have "on every state and municipal government in the United States"), *stay continued*, 419 U.S. 1100 (1975).

These cases dictate the result here. The kind of "institutional harm" the Government alleges it will suffer from an injunction of its desired policy is not an irreparable injury that justifies permitting the dramatic change in immigration policy that a stay would immediately engender. *Cf. Texas* v. *United States*, 787 F.3d 733, 767–68 (5th Cir. 2015) ("[I]t is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect those [separation of powers] principles.").

The Government's other arguments for irreparable harm also fail. The Government contends (at 33) that "enjoining provisions [of the Order] that direct government agencies to assess" and update screening procedures "disables the government from taking action to protect the Nation." But it is unclear why the Government believes it is so helpless. Respondents have repeatedly explained, both at the District Court and at the Ninth Circuit, that the Executive is free to engage in any manner of study, review, upgrade or revision of its existing vetting procedures. The *only* thing the injunction prevents it from doing is engaging in those activities as an excuse for, or in order to perpetuate, the President's unconstitutional travel and refugee bans.

For that reason, there is nothing stopping the President from issuing a new order that (a) directs the agencies to conduct the same worldwide study and review

of vetting procedures described in Section 2(a) of the enjoined Order, (b) mandates the same review of refugee admissions described in Section 6, (c) requests a full set of reports as to the outcomes of these reviews, and (d) requires country specific upgrades to the vetting and screening procedures based on those reports. So long as the order did not use these provisions to justify or expand a veiled Muslim ban, they would survive judicial review.

Indeed, in light of the Government's stated national security concerns, its failure to issue such an order is mystifying. After the first travel and refugee bans were enjoined, the Government argued that it was perfectly consistent with that injunction to enact almost identical bans within the context of a new order. Courts agreed, holding that the constitutionality of the bans in the revised Order would have to be reviewed in their own right. *See Washington* v. *Trump*, 2017 WL 1045950, at *3-4 (W.D. Wash. Mar. 16, 2017).

The Government has offered no coherent explanation as to why it has not adopted a similar approach with respect to the enjoined vetting provisions. Instead, in response to questions about the status of the vetting review during oral argument before the Fourth Circuit, the Government asserted that it had asked the "Hawaii judge" whether he really "meant to enjoin internal governmental review procedures to look at vetting for these six nations," and the judge had said "yes." Oral Arg. at 7:32 to 7:55, *IRAP v. Trump*, *supra*. But that exchange did not occur. Before the District Court, the Government never referenced a belief that the injunction barred any review of "vetting for these six [targeted] nations." And the

District Court never confirmed such a misguided belief. To the contrary, in its preliminary injunction opinion, the District Court expressed confusion as to what, exactly, the Government thought it was barred from doing, given the Government's repeated statements that "most, if not all" of the internal procedures could "take place in the absence of the Executive Order." Add. 22.

In any event, it is Section 5 of the Order—which has not been enjoined—that directs the Secretary of State, Attorney General, and Secretary of Homeland Security to revise their vetting procedures. And the Department of State has proceeded with implementing such new procedures for visa applicants during the time Sections 2 and 6 of the Order have been enjoined. *See* C.A. S.E.R. 67-71; *see also* Br. of *Amicus Curiae* T.A. at 11-12, C.A. Dkt. No. 114. In fact, the President himself recently confirmed that his Administration is already engaged in "EXTREME VETTING." *See supra* p. 10 & n.3. Plainly, a stay of the injunction is not necessary to enable these activities to continue. *See Ruckelshaus*, 463 U.S. at 1317 (denying stay of order enjoining certain FIFRA provisions where EPA "remained able" to enforce FIFRA through other means).

In a final attempt to show irreparable harm, the Government contends that the District Court's Establishment Clause ruling "plainly carries the *potential* to undermine the Executive's ability to conduct foreign relations for the Nation." Stay Appl. 34 (emphasis added). Any such "potential" is a far cry from "a likelihood that irreparable harm [will] result from the denial of a stay," *King*, 133 S. Ct. at 2. In any event, the Executive's immigration power is "subject to important constitutional

limitations," *Zadvydas*, 533 U.S. at 695; the District Court's order could hardly inflict irreparable harm simply by enforcing those limitations.

The Government therefore fails to offer any reason it will be irreparably harmed if the Order is enjoined. By contrast, the harm to Plaintiffs and the general public that a stay would engender would be immense. This Court has made clear that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality op.). The harms are particularly severe in this case, where the Order will have profoundly negative effects on both Dr. Elshikh and the State of Hawaii, *see supra* pp. 13-18, and where history has already shown that the implementation of the travel and refugee bans will sew chaos and discord nationwide. *See Washington*, 847 F.3d at 1157; *see also* C.A. E.R. 152-156.

III. THE SCOPE OF THE INJUNCTION IS PROPER.

Finally, the Government offers several reasons why the injunction should be narrowed. None has merit. First, the Government claims (at 36) that section 2(c) is "indisputably valid" as applied to "foreign nationals with no immediate relatives in the country and no other significant connection to it." Not so. The Order denigrates Muslims and effects a policy of religious intolerance in all its applications; it is therefore unconstitutional as applied against anyone. Indeed, "the mere passage * * * of a policy that has the purpose and perception of government establishment of religion" warrants facial relief. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314. And

the identity of the Order's targets also has no bearing whatsoever on its invalidity under §1182(f).

Second, the Government contends (at 37) that Plaintiffs have not identified any cognizable injury from those subsections of sections 2 that "affect only the government itself." No such subsections exist. As noted, the provisions the Government refers to are procedures expressly designed to excuse and expand the President's unconstitutional ban. Order § 2(e); *see id.* § 2(a)-(b), (d)-(e). They therefore convey the same message of exclusion and discrimination as the ban itself; and because they were enacted "the same day" as section 2(c), and "function[]" as a part of the same seamless policy, "[i]t would be implausible to suggest that" they were not infected by the same discriminatory animus. *Lukumi*, 508 U.S. at 540.

Last, the Government argues (at 39) that the injunction should not have been applied "to all persons worldwide." But a narrower injunction would not fully redress Plaintiffs' injuries. The Order denigrates and burdens all Muslims, including Dr. Elshikh and subjects Hawaii's residents to the "universal sting" of discrimination from which the State's (1982).

The injury at issue in *United States Department of Defense* v. *Meinhold*, 510 U.S. 939 (1993), was entirely different; it did not involve a Government order that broadly burdened and denigrated citizens of a particular faith, but a simple request regarding records pertaining to the plaintiff himself. Nor did it implicate the Constitution's requirement for "an *uniform* Rule of Naturalization." U.S. Const., art. I, § 8, cl. 4 (emphasis added). Because of that requirement, ushering in a

fragmented system of individualized exceptions to the Order would work harms to the public interest in itself. *See Texas v. United States*, 809 F.3d 134, 187-188 (5th Cir. 2016); *Washington*, 847 F.3d at 1166-67.[5]

* * * *

In short, the Government has utterly failed to demonstrate any reason for this Court to stay the injunction. It has also failed to demonstrate any need for this Court to grant review of the injunctions barring enforcement of the Executive Order. Accordingly, the stay should be denied, and the related stay request and certiorari petition in *IRAP* v. *Trump* should similarly be rejected. Should the Court disagree, and decide to consider the merits of the injunctions, respondents acknowledge that it is necessary and appropriate to consider *IRAP* v. *Trump* and *Hawaii* v. *Trump* at the same time. Therefore, if this Court decides that it must grant review in *IRAP*, and if the Ninth Circuit has not yet issued a decision in this case, respondents acquiesce to the Government's alternative request to grant certiorari before judgment in this case, but request that the Court hear the cases in tandem on an expedited basis before its summer recess if the stays are granted.

CONCLUSION

The application should be denied.

Respectfully submitted,

---

[5] The Government's contention that an injunction may not be issued directly against the President was never raised in the District Court and is waived. *See* C.A. Reply Br. at 29 (conceding that the issue was not raised). In any event, "injunctive relief against executive officials like" is certainly "within the court's power." *Franklin* v. *Massachusetts*, 505 U.S. 788, 802-803 (1992).

DOUGLAS S. CHIN
Attorney General of the State of Hawaii
CLYDE J. WADSWORTH
Solicitor General of the State of Hawaii
DEIRDRE MARIE-IHA
DONNA H. KALAMA
KIMBERLY T. GUIDRY
ROBERT T. NAKATSUJI
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL,
STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

Counsel for the State of Hawaii

NEAL KUMAR KATYAL*
COLLEEN ROH SINZDAK
MITCHELL P. REICH
ELIZABETH HAGERTY
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com
**Counsel of Record*

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

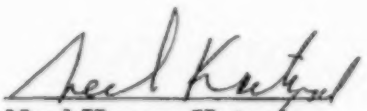
SARA SOLOW
ALEXANDER B. BOWERMAN
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103

Counsel for Respondents

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29 5, I, Neal Kumar Katyal, a member of the Supreme Court Bar, hereby certify that one copy of the foregoing Response to Application for Stay was served via electronic mail and Federal Express on June 12, 2017 on:

JEFFREY B. WALL
Acting Solicitor General
U.S. DEPARTMENT OF JUSTICE
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217
Counsel for Applicants



Neal Kumar Katyal

Supreme Court, U.S.
FILED
JUN 21 2017
OFFICE OF THE CLERK

No. 16A1191

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
APPLICANTS

v.

STATE OF HAWAII, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR STAY PENDING APPEAL AND PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 16A1191

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., APPLICANTS

v.

STATE OF HAWAII, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR STAY PENDING APPEAL AND PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

To summarize where this case stands: respondents brought an unripe challenge before a single alien abroad had been denied a visa, an act that is itself generally unreviewable. Respondents then obtained a global injunction, including against portions and applications of Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), that do not even arguably affect them. The injunction now rests on a statutory argument that respondents did not raise below and that the Fourth Circuit declined to adopt in ruling on constitutional grounds. And because the Ninth Circuit narrowed the injunction, and the President is proceeding to implement those provisions of the Order that are no longer enjoined while seeking this stay, respondents claim that it is somehow the President's action -- rather than the injunction in their own

case -- that has undermined the Order. None of respondents' arguments adheres to usual legal rules; each is tailor-made for this Order alone. This Court should stay this injunction, grant certiorari here and in Trump v. IRAP, No. 16-1436, and expedite its consideration of these important cases.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI

This case warrants review. Indeed, respondents previously conceded "the fundamental importance of the underlying legal issues." Opp. 11. And respondents no longer press their earlier claim that certiorari is unnecessary because, although certain provisions of the Order have been enjoined, the government has taken other steps to improve national security. See Opp. 11-12; Gov't Supp. Br. 29. Of respondents' remaining arguments against certiorari (Supp. Br. 35-40), none bears even minimal scrutiny.

A. Respondents contend (Supp. Br. 36-37) that the Ninth Circuit's decision diminishes the need for review. But the Ninth Circuit upheld broader injunctive relief than the Fourth Circuit in IRAP, and it did so based on a novel reading of 8 U.S.C. 1182(f) that respondents themselves never urged and that only two judges of the Fourth Circuit endorsed. See IRAP v. Trump, 857 F.3d 554, 608-611 (2017) (en banc) (Keenan, J., joined by Thacker, J., concurring in part and concurring in the judgment). A majority of the en banc Fourth Circuit necessarily found that statutory argument insufficient to avoid the constitutional issue. Id. at

580-581. Although respondents are correct that 13 federal appellate judges have voted to invalidate the Order (Supp. Br. 6), eight appellate judges have voted to uphold it or the Order it replaced, and they at least agree on the governing rationale.[1]

In any event, the fact that the decision below nullifies a national-security directive of the President warrants review regardless of whether the circuits are divided. This Court has granted review on important questions of immigration law in the absence of any square, developed conflict. See United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam); Arizona v. United States, 567 U.S. 387 (2012). It should do the same here.[2]

B. Respondents reprise (Supp. Br. 37-39) their contention that the government's litigation conduct undercuts the need for review, but it gains no force through repetition. Gov't Supp. Br. 28-29. At every stage, the government has moved quickly and sought a stay. Respondents suggest (Supp. Br. 37) the government could have saved time by stipulating to conversion of the temporary restraining order (TRO) to a preliminary injunction. But as the Ninth Circuit has now recognized, the TRO's scope would have

---

[1] See generally, e.g., IRAP, 857 F.3d at 639 (Niemeyer, J., joined by Shedd and Agee, JJ., dissenting); Amended Order, Washington v. Trump, No. 17-35105 (9th Cir. Mar. 17, 2017) (Kozinski, J., joined by Bybee, Callahan, Bea, and Ikuta, JJ., dissenting from denial of reconsideration en banc).

[2] Respondents wrongly suggest (Supp. Br. 36) that the procedural posture here weighs against review. Texas and Arizona also involved preliminary injunctions, and the decision below rests squarely on the court's assessment of the merits.

restrained even provisions addressing internal government reviews of vetting procedures. Supp. Add. 70-72. It was thus essential for the government to seek to narrow the scope of injunctive relief in the district court so that those reviews could proceed.

Respondents also fault the government (Supp. Br. 38) for not short-circuiting the lower courts' review by seeking immediate relief from this Court. They claim, however, that even now this Court's review is premature. See p. 3 n.2, supra. In any event, the government moved to (and did) expedite proceedings in the court of appeals, but in a manner that allowed that court to consider its stay request after full briefing in the hope that relief from this Court would not be necessary -- and to ensure that, if it were, this Court would have the benefit of the Ninth Circuit's considered ruling. The government has moved this case through the courts with urgency and care at every stage.

C. Respondents' primary argument against review (Supp. Br. 1, 7, 35-36) rests on the President's June 14, 2017, memorandum (Memorandum) clarifying that the Order's enjoined provisions will take effect as soon as the injunctions here and in IRAP are stayed or lifted. That Memorandum should not have been necessary, but the IRAP respondents argued to this Court (as a reason why the government's certiorari petition and stay application were moot) that Section 2(c)'s 90-day suspension was set to expire last week, notwithstanding the injunctions here and in IRAP. Br. in Opp. at 13, IRAP, No. 16-1436 (June 12, 2017). The President's Memorandum

confirms what the Order's text and common sense indicate: a stay of these injunctions will provide meaningful relief, by allowing the entry and refugee suspensions to operate in tandem with the parallel reviews, just as the Order envisions.

Respondents here and in IRAP, however, claim that the President is the one who severed the link between the entry and refugee suspensions and the accompanying reviews of those programs. Resps. Supp. Br. 1; Resps. Supp. Br. at 1, 4, IRAP, No. 16-1436 (June 20, 2017). That is simply wrong. It is the injunctions in these cases -- not any actions of the President -- that are preventing the Order's various provisions from operating together. If this Court stays those injunctions, the Order will function precisely as the President intended: the entry and refugee suspensions will take effect during approximately the same period as the reviews, which will free resources to perform those reviews and promote national security by limiting the entry of certain foreign nationals while those reviews are ongoing.

Respondents do not press (Supp. Br. 35) the argument advanced by the IRAP respondents in their supplemental brief filed yesterday -- namely, that the President's ability to take different or additional measures after the reviews are completed means the 90- and 120-day suspensions will eventually be overtaken by events. The question is whether, in the meantime, the President should be able to implement all of the Order's provisions as an integrated whole. And the answer to that question should turn on

whether the government has met this Court's well-established stay standard -- not on whether the temporary suspensions, which are important now, will pass in time. The IRAP respondents' approach would mean that this Court could not stay (and then review) any injunction against a temporary measure of short duration. See Gov't Stay Reply at 13, Trump v. IRAP, No. 16A1190 (June 14, 2017). Neither the IRAP respondents, nor respondents here, offer any response to these points.

II. THERE IS A FAIR PROSPECT THAT THIS COURT WILL SET ASIDE THE DECISION BELOW

Respondents devote the bulk of their submission (Supp. Br. 8-31) to defending the court of appeals' decision on the merits. Respondents' defense is unpersuasive.

A. Respondents' Statutory Claims Are Not Justiciable

Respondents' statutory claims face two threshold difficulties that they barely address. First, respondents do not dispute that aliens abroad generally lack any rights regarding entry, and as a result the denial of entry or a visa to such aliens is ordinarily not subject to judicial review. Gov't Supp. Br. 7-8. Respondents do not even discuss (Supp. Br. 8-10) the doctrine of consular nonreviewability. Although this Court has twice permitted limited review where U.S. citizens plausibly alleged that the refusal of a visa to an alien abroad violated the citizens' own constitutional rights, see Kerry v. Din, 135 S. Ct. 2128 (2015); Kleindienst v.

Mandel, 408 U.S. 753 (1972), respondents cite no decision of this Court extending such review to statutory claims.[3]

Second, the only basis for judicial review would be the Administrative Procedure Act, 5 U.S.C. 704. Even assuming that review is not precluded for the reasons given above, see 5 U.S.C. 701(a), here there is no "final agency action" for a court to review: no alien abroad has been denied a visa pursuant to Section 2(c). Respondents do not dispute that the Order contains a detailed waiver provision, that one of the grounds for a waiver is reuniting with close family members in the United States, and that Dr. Elshikh's mother-in-law may seek a waiver on that basis. Gov't Supp. Br. 9-10. Likewise, none of the students Hawaii wants to enroll has been denied a visa or waiver. For similar reasons, respondents do not have a ripe claim. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 891-892 (1990). The Court could reverse the injunction on that ground alone without resolving any other issue in this case. After all, in both Mandel and Din, the Court did not consider the constitutional claims at issue until after the visa (and in Mandel, a waiver) had been denied to the alien abroad. There is no reason for a different result here.

---

[3] In Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993), this Court did not address reviewability. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998) ("[D]rive-by jurisdictional rulings * * * have no precedential effect.").

B. Respondents' Statutory Claims Are Meritless

1. The Order is consistent with 8 U.S.C. 1182(f)

a. Respondents do not dispute that the Ninth Circuit adopted a position they never urged and no other court has embraced: the Order violates Section 1182(f) because the President failed to make a sufficient finding that the entry of aliens from the six countries and refugees would be detrimental to the national interest. But as this Court reiterated only days ago, "[n]ational-security policy is the prerogative of the Congress and President," and "[j]udicial inquiry into the national-security realm raises concerns for the separation of powers in trenching on matters committed to the other branches." Ziglar v. Abbasi, No. 15-1358 (June 19, 2017), slip op. 19 (citation and internal quotation marks omitted). Courts thus accord "deference to what the Executive Branch has determined is essential to national security." Ibid. (ellipsis, citation, and internal quotation marks omitted).

Section 1182(f) calls for even greater deference to the Executive because it confirms the President's discretion at every turn: the statute reserves to the President (1) whether and when to suspend entry by proclamation ("[w]henever he finds that the entry" of aliens "would be detrimental" to the national interest); (2) whose entry to suspend ("all aliens or any class of aliens," whether as "immigrants or nonimmigrants"); (3) for how long ("for such period as he shall deem necessary"); (4) and on what terms ("he may * * * impose on the entry of aliens any restrictions he

may deem to be appropriate"). 8 U.S.C. 1182(f). Respondents have no answer for the statutory text, or for the wide latitude that the Executive has historically been afforded in making national-interest determinations. See Gov't Supp. Br. 15 & n.3.

Respondents argue (Supp. Br. 25) that the President must "actually find" that entry of aliens would be detrimental. But the President did make such a finding. See Order §§ 1(b)(iii), 1(h), 2(c), and 6(b). The question here is not whether the President failed to make a finding, but whether the President may rest that finding on a risk assessment regarding the inability or unwillingness of certain foreign governments to provide reliable information about their nationals -- and whether courts are free to second-guess the adequacy of the President's national-interest determination. Respondents offer nothing that would support limiting the grounds on which the President may invoke Section 1182(f), or that would require a reviewing court to agree in its own independent judgment with the President's risk assessment. See Webster v. Doe, 486 U.S. 592, 600 (1988).

Respondents dismiss (Supp. Br. 10) Doe, Franklin v. Massachusetts, 505 U.S. 788 (1992), and Dalton v. Specter, 511 U.S. 462 (1994), because those cases contemplated review in certain circumstances of claims that an Executive official exceeded his authority. But those decisions do not support the proposition that a court may review the President's decision on matters the statute commits to his discretion, see Dalton, 511 U.S. at 474-476,

which Section 1182(f) does. Respondents rely on Mach Mining, LLC v. EEOC, 135 S. Ct. 1645 (2015), but that case -- which involved agency conciliation procedures in employment-discrimination cases -- does not remotely support the Ninth Circuit's invasive review of the President's national-security judgments.

At bottom, respondents resort (Supp. Br. 18-20) to attacking a straw man: that reversing the decision below would mean a "practically limitless immigration power." To be sure, as this Court has held, Section 1182(f) grants the President broad authority: it "clear[ly]" authorizes a naval blockade directed against aliens from an entire nation. Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 187 (1993). Respondents offer no difference in principle between that and the entry and refugee suspensions at issue here. But from the fact that the President may place 90- and 120-day pauses on entry by certain foreign nationals and refugees, it does not follow that the President's powers are boundless. As explained below, see pp. 12-15, infra, the President has not sought to override other immigration provisions (once those provisions are properly understood), and the Order is entirely constitutional under Mandel and Din.

b. In any event, respondents fail to impugn the Order's findings under any standard. Aside from passing, cursory references (Supp. Br. 23, 26), they make no effort to undermine the findings in the Order that support Section 6(a)'s refugee suspension or Section 6(b)'s lowering of the refugee cap. There

is no basis for the injunction against those provisions. The same is true of Section 2(c)'s entry suspension, which rests on two related national-security risks that the Order identifies: the six countries' sponsorship or sheltering of terrorism both "diminishes [their] willingness or ability to share or validate important information about individuals seeking to travel to the United States" and "increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States." Order § 1(d).

Respondents do not attack those findings on their own terms. Instead, they distort the Order's rationale, arguing that there is "no basis for thinking that all nationals of the six covered countries * * * pose a risk of terrorism." Supp. Br. 23 (emphasis omitted). But the Order does not find that all nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen pose terrorism threats. Rather, the Order finds that the United States may not have complete, reliable information to determine which nationals of those countries pose such a threat. Respondents dismiss (Supp. Br. 24) that concern as "newly minted," but it appears on the Order's face. See Order § 1(d); see also Gov't C.A. Br. 10. The Order is premised on the "unacceptably high" "risk" that would-be terrorists will exploit conditions in their home countries to travel to this Nation undetected. Order § 1(d); see id. § 1(f).

Respondents' argument boils down to a policy disagreement with the President's risk assessment and whether the Order

adequately addresses it. For instance, respondents contend (Supp. Br. 23) that the Order is overinclusive because some of the affected nationals live elsewhere, but that line reflects the need for information from foreign governments about their nationals (indeed, the Order expressly excludes dual nationals traveling on a passport not issued by one of the six countries, Order § 3(b)(iv)). Respondents similarly argue (Supp. Br. 24) that the suspension is overbroad because immigration officials can deny entry to suspected terrorists on a case-by-case basis. But the question is whether the foreign governments specified in the Order are willing and able to provide reliable information, and the President has made a categorical judgment that a temporary pause on entry is warranted while he investigates that situation. Respondents' objections to that judgment belong in the political arena, not the courts.

2. The Order is consistent with 8 U.S.C. 1152(a) and 1157

Respondents press (Supp. Br. 26-28) two other statutory arguments that the Ninth Circuit adopted. Both lack merit, and neither supports the full scope of the current injunction.

a. Respondents argue (Supp. Br. 26-27) that Section 2(c)'s temporary pause on entry violates 8 U.S.C. 1152(a)(1)(A) because its implementation entails denying visas based partly on nationality. Even if that were correct, the claim would not support affirmance for two reasons. First, it has nothing to do

with the refugee suspension and cap, which apply without any regard to nationality. Second, Section 1152(a)(1)(A) deals with the issuance of immigrant visas -- not the issuance of nonimmigrant visas, and not entry into the United States. At most, the claim would require the government to issue immigrant visas to a fraction of the aliens affected by Section 2(c), who could then be barred from entry when they arrived at the Nation's borders.

Sections 1152 and 1182 should be interpreted in harmony not to require that fruitless result. Section 1182(f) provides that the President may suspend the entry of aliens "as immigrants or nonimmigrants," and there is no evident reason why Congress would have wanted the former set (but not the latter) to receive visas but be denied admission. 8 U.S.C. 1182(f). To the contrary, Congress specified that no visa may issue if the applicant "is ineligible * * * under [S]ection 1182." 8 U.S.C. 1201(g). Section 1182 lists many such grounds for ineligibility, among them health, criminal history, and terrorist affiliation. Whatever the relevant underlying ground in any individual case, the alien is denied a visa because he is "ineligible" to enter "under [S]ection 1182." So too here, if an alien is subject to the Order and does not receive a waiver, he is being denied an immigrant visa <u>because he has been validly barred from entering the country under Section 1182(f)</u> -- not because he is suffering the type of nationality-based discrimination prohibited by Section 1152(a)(1)(A).

That reading not only harmonizes Sections 1152(a) and 1182(f), but it has other virtues as well. First, it accords with the settled principle that the later-enacted Section 1152 should not be construed as partially repealing Section 1182(f) by implication. Gov't Supp. Br. 22. Second, it is consistent with longstanding State Department practice, which has treated aliens covered by Section 1182(f) proclamations as ineligible for visas. See 9 U.S. Dep't of State, Foreign Affairs Manual 302.14-3(B) (2016). Third, it avoids the constitutional concerns with limiting the President's authority to suspend the entry of nationals from any particular foreign country. Respondents avoid those concerns only by reading into Section 1152(a)(1)(A) an atextual exception for "a national emergency," Supp. Br. 27 n.6, thereby conceding the fundamental difficulties with their interpretation.

b. Respondents further argue (Supp. Br. 27-28) that Section 6(b)'s refugee cap violates 8 U.S.C. 1157. That claim has no bearing on Sections 2(c) or 6(a), and it lacks merit. Respondents do not grapple at all with the statutory text, purpose, or history. They deny that there is a "textual basis" for permitting fewer refugees than the annually authorized maximum, but the statutory text is undeniably discretionary: Section 1157 speaks of "the number of refugees who may be admitted." 8 U.S.C. 1157(a)(2) (emphasis added). Respondents do not address the legislative history or the fact that the number of admitted refugees often falls far below the maximum. Gov't Supp. Br. 25-26 & nn.4-5.

3. The Order is consistent with 8 U.S.C. 1182(a)

Finally, respondents press (Supp. Br. 20-22) an argument that the court of appeals did not adopt. Contrary to the suggestion created by their spliced quotations (id. at 20), the court declined to decide whether Section 2(c) conflicts with 8 U.S.C. 1182(a)(3)(B). Supp. Add. 60 ("We need not decide the precise scope of § 1182(f) authority in relation to § 1182(a)(3)(B)."). Respondents' own cases show that there is no conflict: both Abourezk v. Reagan, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (R.B. Ginsburg, J.), aff'd by an equally divided Court, 484 U.S. 1 (1987), and Allende v. Shultz, 845 F.2d 1111, 1118-1119 (1st Cir. 1988), explained that the President may use his "sweeping proclamation power" under Section 1182(f) to suspend entry of aliens for reasons that overlap with Section 1182(a)'s grounds of inadmissibility. That Congress "considered the terrorism risk posed by nationals of these countries" and adopted certain measures (Resps. Supp. Br. 21) is beside the point, because Congress also expressly gave the President power to suspend entry of any alien whose entry he finds detrimental to the Nation's interests.[4]

---

[4] Respondents vaguely assert (Supp. Br. 21-22) that the Order conflicts with the "structure and policies" of immigration law. Historical practice suspending or restricting entry based partly on nationality under both Sections 1182(f) and 1185(a)(1) forecloses any contention that the immigration laws implicitly preclude such distinctions. Gov't C.A. Br. 22; D. Ct. Doc. 145, at 28 (Mar. 13, 2017). The "power" to "exclude or expel" is "inherent because the very idea of nationhood requires the drawing of thorny lines -- between members and non-members, between admitted and excluded." Ledezma-Cosino v. Sessions, No. 12-73289,

C. Respondents' Establishment Clause Claim Is Meritless

Respondents' reiteration (Supp. Br. 15-16, 28-31) of their Establishment Clause claim adds nothing to the analysis. They insist (id. at 15) that their claims are justiciable, repeating in two sentences the purported harms they suffer. But each of those alleged harms stems from application of the Order to others, i.e., aliens abroad. This Court has made clear -- including in McGowan v. Maryland, 366 U.S. 420, 429-430 (1961) -- that individuals indirectly injured by alleged religious discrimination against others generally may not sue. Gov't C.A. Reply Br. 9-10. Respondents offer no answer to that clear rule. They argue that the Order violates their own religious-freedom rights because it sends them an offensive "message," but the D.C. Circuit rejected that end run around standing limitations in In re Navy Chaplaincy, 534 F.3d 756 (2008), which respondents do not address.

On the merits, respondents misread (Supp. Br. 28) Mandel, 408 U.S. 753, as applicable to policy decisions made by Congress but not the Executive. That approach makes no sense, particularly where, as here, the President acts pursuant to express statutory authority. Gov't C.A. Reply Br. 12. Respondents also argue (Supp. Br. 29) that Mandel invites looking behind facially legitimate objectives, but only the dissent in Mandel considered "the absence of facts supporting the Government's asserted purpose." See

---

2017 WL 2324717, at *6 (9th Cir. May 30, 2017) (en banc) (Kozinski, J., joined by Bea and Ikuta, JJ., concurring).

408 U.S. at 778 (Marshall, J., dissenting). The Court expressly declined to do so. Id. at 770. Respondents' further claim (Supp. Br. 30-31) that the President's Memorandum undermines the Order's facially legitimate and bona fide basis is wrong for the reasons explained above. See pp. 4-5, supra.[5]

III. THE BALANCE OF EQUITIES DECISIVELY FAVORS A STAY

The balance of equities strongly supports staying the injunction the Ninth Circuit affirmed. At a minimum, respondents have not demonstrated any cognizable injury from the Order's application to others besides Dr. Elshikh's mother-in-law, much less injury that could conceivably warrant global relief.

A. Respondents minimize (Supp. Br. 31-32) the harms caused by the injunction to the government and the public. They dismiss (ibid.) the interference with the President's national-security judgment on the ground that the Court has declined to stay injunctions against federal policies before. The interference here, however, is direct and indisputable: the President expressly determined that the Order's provisions are needed to promote national security, but the lower courts here (and in IRAP) nullified that judgment. Respondents' observation (id. at 32)

---

[5] Respondents offer no additional justification for impugning a religion-neutral Executive Order based on campaign statements. They cite only a 22-year-old Second Circuit brief addressing -- in the context of claims under the Fair Housing Act, 42 U.S.C. 3601 et seq. -- material showing that the local campaign to create a new village was undertaken for the purpose of excluding a sect. Resps. Supp. Br. 30-31 (citing Gov't Reply Br., LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir. 1995) (No. 94-7103)).

that the Executive may take other steps to improve information-gathering from other countries misses the point: the President, in consultation with Cabinet officials, determined that a temporary pause was necessary to protect national security while he assessed the willingness and ability of the governments of the six Section 2(c) countries to provide the information necessary to vet nationals from those countries properly.

B. For their own part, respondents repeat (Supp. Br. 31) the harms they previously alleged. Critically, none of these alleged injuries plausibly justifies enjoining Sections 2(c), 6(a), and 6(b) as to all persons worldwide.

First, the only injury Dr. Elshikh asserts for his statutory challenge to Section 2(c) is the possible effect of the Order on his mother-in-law's entry. Resps. Supp. Br. 10-11. Even assuming that claim is ripe, his putative injury would be fully redressed by an injunction limited to her and Section 2(c). Second, the only injury Dr. Elshikh asserts for his constitutional challenge to Section 2(c) is the "message" that the Order allegedly conveys. To the extent respondents contend that injury would justify a global injunction, it only underscores why the injury cannot be cognizable in the first place. See pp. 6-7, supra. A plaintiff cannot reframe government conduct directed at aliens abroad as government speech directed at U.S. citizens in order to obtain a global injunction. Third, the only injury Dr. Elshikh asserts for the refugee provisions in Section 6(a) and (b) is that "[h]e is

the Imam of a mosque in Hawaii that counts refugees as members." Resps. Supp. Br. 12. That injury is plainly not cognizable, let alone irreparable, and he identifies no refugee abroad whose entry could possibly affect his rights. Fourth, Hawaii's putative injuries add nothing. The State identifies no cognizable sovereign interest in the entry of aliens abroad, much less the entry of refugees.

Like the court of appeals (Supp. Add. 75), respondents try to dodge the problem by arguing (Supp. Br. 33) that global relief is appropriate because every application of the Order is "illegal." That argument conflates the nature of respondents' legal theory with what matters to the scope of equitable relief: the irreparable injury to the plaintiffs before the Court based on a violation of their own rights. Wholly apart from whether respondents' legal arguments would apply to every application of Sections 2(c), 6(a), and 6(b), Article III and equitable principles confine injunctive relief to that which is necessary to redress respondents' cognizable injuries. Stay Appl. 37.

Respondents' attempt (Supp. Br. 33-34) to derive a contrary rule from this Court's cases is unavailing. Their lead case, Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000), has no bearing on the scope of injunctive relief and simply held the school district's prayer policy invalid. The relief granted there, moreover, was permissible because the school-prayer policy was directed to the audience of which the plaintiff was a part, and

could realistically be redressed only by ending the practice. That is not true of any of respondents' claims here. Respondents' remaining cases are still further afield.[6]

There is simply no basis for enjoining Sections 2(c), 6(a), and 6(b) wholesale. The Court should hold that the government is likely to succeed on the merits and, as in United States Department of Defense v. Meinhold, 510 U.S. 939 (1993), stay the injunction except as to Dr. Elshikh's mother-in-law (or, at most, also as to specific students that Hawaii identifies who have accepted admission for the upcoming school year, cf. Aziz v. Trump, No. 17-116, 2017 WL 580855, at *10 (E.D. Va. Feb. 13, 2017)).

---

[6] Most involved direct review in courts of appeals, see National Wildlife Fed'n, 497 U.S. at 891-892, and have nothing to do with the proper scope of injunctive relief in district-court actions. See Gonzales v. Oregon, 546 U.S. 243 (2006), aff'g 368 F.3d 1118, 1120-1121 (9th Cir. 2004) (explaining that case involved petition for direct review); Dole v. United Steelworkers of Am., 494 U.S. 26 (1990); Pittston Coal Grp. v. Sebben, 488 U.S. 105 (1988); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). Reno v. ACLU, 521 U.S. 844 (1997), involved severability rather than relief to nonparties, and the "vast array" of plaintiffs, the varied nature of their conduct, and the vagueness of the statute made limiting relief not "practicable." Id. at 883-884; see id. at 861 nn.27-28. And Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), and National League of Cities v. Brennan, 419 U.S. 1321 (1974) (Burger, C.J., in chambers), did not address the scope of injunctive relief for nonparties, and each involved large organizations suing on behalf of their members.

CONCLUSION

The Court should construe the government's stay application as a petition for a writ of certiorari and grant the petition along with the petition for a writ of certiorari in IRAP. In addition, the Court should stay the injunction in its entirety pending disposition of the petition and any further proceedings in this Court. At a minimum, it should stay the injunction as to all persons other than Dr. Elshikh's mother-in-law and any specific students Hawaii identifies who have accepted admission.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

JUNE 2017

MOTION FILED
JUL 18 2017

No. 16-1540 (16A1191)

FILED
JUL 18 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

STATE OF HAWAII, ET AL.

Motion for Clarification of June 26, 2017, Stay Ruling and Application for Temporary Administrative Stay of Modified Injunction

BRIEF OF *AMICI CURIAE* FORMER NATIONAL SECURITY OFFICIALS IN OPPOSITION TO THE MOTION FOR CLARIFICATION

JONATHAN FREIMAN
TAHLIA TOWNSEND
WIGGIN AND DANA LLP
265 Church Street
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4584

WILLIAM J. MURPHY
JOHN J. CONNOLLY
ZUCKERMAN SPAEDER LLP
100 E. Pratt St.
Suite 2440
Baltimore, MD 21202
(410) 332-0444

HAROLD HONGJU KOH
Counsel of Record
HOPE METCALF
RULE OF LAW CLINIC
Yale Law School
127 Wall Street
P.O. Box 208215
New Haven, CT 06520-8215
(203) 432-4932
harold.koh@yale.edu

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE FORMER NATIONAL SECURITY OFFICIALS IN OPPOSITION TO THE MOTION FOR CLARIFICATION

The motion filed by Petitioners Donald J. Trump, et al., for clarification of this Court's June 26, 2017 per curiam ruling ("June 26 ruling") raises issues of critical importance. Amici, a group of former national security officials identified in the Appendix to the attached brief, are in a unique position to provide guidance to the Court regarding the consequences to U.S. national security and foreign policy that would result from granting the petitioners' application for a stay. As a result, amici can explain to the Court that the petitioners' interpretation of the Court's June 26 ruling is unnecessary to protect the national security or foreign policy of the United States and, in fact, would cause harm to those interests.

On July 17, 2017, amici requested consent from the parties to file this brief. The petitioners did not oppose the filing of an amicus brief, and the respondents consented. Due to the expedited nature of this motion, amici requested consent fewer than 10 days prior to the due date of respondents' papers as set out in Rule 37.2(a). Also, Supreme Court Rule 37.2 does not expressly address the procedure by which an amicus may submit a brief regarding a motion of this sort. Accordingly, amici respectfully move this Court for leave to file the accompanying brief in opposition to petitioners' motion for clarification.

Respectfully submitted,

JONATHAN FREIMAN
TAHLIA TOWNSEND
Wiggin and Dana LLP
265 Church Street
P.O. Box 1832
New Haven, CT
06508-1832
(203) 498-4584

WILLIAM J. MURPHY
JOHN J. CONNOLLY
Zuckerman Spaeder LLP
100 E. Pratt St.
Suite 2440
Baltimore, MD 21202
(410) 332-0444

HAROLD HONGJU KOH
Counsel of Record
HOPE METCALF
Rule of Law Clinic
Yale Law School
127 Wall Street
P.O. Box 208215
New Haven, CT
06520-8215
(203) 432-4932
harold.koh@yale.edu

July 18, 2017

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
STATEMENT OF INTEREST 1
SUMMARY OF ARGUMENT 1
ARGUMENT 2
CONCLUSION 9
APPENDIX: List of *Amici Curiae* 1A

TABLE OF AUTHORITIES

Page(s)

MISCELLANEOUS

Alex Nowrasteh, *A Risk Analysis,* Cato Institute (Sept. 13, 2016) 7

Amy Pope, *The Screening Process for Refugee Entry into the United States* (Nov. 20, 2015) 6

Andorra Bruno, *Syrian Refugee Admissions and Resettlement in the United States: In Brief,* Cong. Research Serv. (Sept. 16, 2016) 6

Br. of Amici Curiae Former National Security Officials in Opposition to the Applications for a Stay, Nos. 16-1436, 16A1191 (June 12, 2017) 4

Migration Policy Institute, *Syrian Refugees in the United States* (January 12, 2017)..... 7

U.S. Dep't of State, *The Refugee Processing and Screening System* 6

STATEMENT OF INTEREST[1]

Amici curiae are former national security, foreign policy, intelligence, and other public officials who have worked on security matters at the most senior levels of the United States government in the administrations of Presidents from both major political parties.[2] Amici have collectively devoted decades to combatting the various terrorist threats that the United States faces in an increasingly dangerous and dynamic world.

A significant number of amici were current on active intelligence regarding credible terrorist threat streams directed against the United States as recently as one week before the issuance of the initial January 27, 2017 Executive Order on "Protecting the Nation from Foreign Terrorist Entry into the United States" ("January 27 Executive Order"), and one was current as recently as early March 2017, around the time of the issuance of the revised March 6, 2017 Executive Order bearing the same name ("March 6 Executive Order").

SUMMARY OF ARGUMENT

Amici write briefly to offer their views on three points. First, the Government's position on the in-

---

[1] No party or counsel for a party to this appeal authored this brief in whole or in part, or contributed monetarily to the preparation or submission of any portion of this brief. On July 17, 2017, amici requested consent from the parties to file this brief. The petitioners did not oppose the filing of an amicus brief, and the respondents consented. Due to the expedited nature of these proceedings, amici requested their consent fewer than 10 days prior to the due date of the responsive papers. Amici have submitted a motion for leave to file this brief.

[2] A complete list of signatories may be found in the Appendix.

terpretation of this Court's June 26, 2017 per curiam stay ruling ("June 26 ruling") does not advance the national security or foreign policy interests of the United States. Second, the Government's position in fact would damage the national security and foreign policy interests of the United States. Third, the Government's position is at odds with the reality of refugee resettlement.

The Government initially argued that a suspension of admissions from six countries was necessary to protect the country and to free resources for a review of admission procedures. The Government now seeks to bar a subset of the original group for a shorter period. As the travel ban has evolved, the connection of this narrower ban to any meaningful national security concerns has become attenuated to the vanishing point.

ARGUMENT

Amici write to offer their views on three points relevant to the national security and foreign policy implications of the Government's position in its motion for clarification.

First, the Government's narrow reading of this Court's June 26, 2017 ruling does not serve any national security or foreign policy interest. This many months into these proceedings, the Government still cannot offer a single national security or foreign policy rationale for the Executive Orders. And in its papers filed with this Court, the Government has not cited a single national security rationale for its narrow interpretation of this Court's Order.

To be sure, the Government's position is *about* the United States' national security and foreign policy interests, inasmuch as this is a case about travel

and visas. But the Government cannot explain how its position is *necessary* or even has a *rational connection* to the United States' national security and foreign policy interests. And so, for example, the Government offers no national security reason for why grandparents should be subjected to the ban when other close family members—or even paid au pairs—are not. Amici respectfully submit that the Government's inability to offer any national security rationale at all for its interpretation undermines the claim of irreparable harm that the Government must demonstrate to sustain its motion.

Through the years, national security-based immigration restrictions have: (1) responded to specific, credible threats based on individualized information, (2) rested on the best available intelligence, and (3) been subject to thorough interagency legal and policy review. Neither the January 27 Executive Order or the March 6 Executive Order rest on such tailored grounds, but rather, (1) are generalized entry bans, (2) are not supported by any new intelligence that the Government has cited or of which amici are aware, and (3) were not vetted through the sort of careful interagency legal and policy review that would compel judicial deference.

The Government's cramped reading of this Court's June 26 ruling compounds the error in the January 27 and March 6 Executive Orders, directing the focus even further afield from the national security issues that should be at the core of the inquiry. The Government's insistence on drawing arbitrary lines between grandparent and brother, or between a refugee with a formal connection to a resettlement agency and a lecturer with a formal connection to an American audience, is not based on any meaningful

assessment of a national security threat. Instead, the Government layers new *subject-matter* categories on top of earlier *country-based* categories, all of which distinguish poorly between those individuals who do and do not present an actual threat to our nation. Whether a particular individual seeking entry presents a threat to national security depends on what he has actually done or threatened to do, not on the kind of familial or institutional relationship he may have with someone inside the United States.

Second, amici believe that the Government's narrow interpretation of this Court's Order in fact would do harm to the security and foreign policy interests of the United States. As amici have explained elsewhere,[3] the Government's reliance on generalized bans on travelers and refugees without an individualized assessment of security threat is counterproductive from a security perspective. This generalized approach is likely to: endanger U.S. troops in the field, by barring many foreigners who have assisted our troops at great risk to their own lives; disrupt essential counterterrorism, intelligence, and other security partnerships with countries that are critical to our country's efforts to address the threat posed by terrorist groups such as IS; feed IS's propaganda narrative, while hindering law enforcement efforts to fight homegrown terrorism by alienating Muslim-American communities; cause serious humanitarian harm; and result in economic damage to the United States, including in ways that affect strategic eco-

---

[3] *See Br. of Amici Curiae Former National Security Officials in Opposition to the Applications for a Stay*, Nos. 16-1436, 16A1191, June 12, 2017, at 12-15.

nomic sectors such as defense, technology and medicine.

The Government's narrow interpretation of this Court's Order suffers from these same flaws. The Government would exclude from the United States any number of individuals with bona fide relationships with this country who create no security risk and would benefit the nation, simply because they are uncles rather than brothers, or have formed a relationship with one entity in the United States rather than another. This approach is at odds with the nation's contextualized and individualized approach to screening travel to the United States.[4] It also imposes an arbitrary travel ban upon countless individuals in ways that could do real harm to the United States' national security or foreign policy interests.

Third, amici include a number of officials who have held for extended periods of time the most senior responsibility within the U.S. Government for overseeing the refugee resettlement process. Amici submit that in several respects, the Government's position entirely misunderstands the realities of—and the national security protections provided by—the existing process.

Refugees already receive the most thorough vetting of any travelers to the United States, and that vetting process is constantly reviewed and tightened as the situations demand. Refugee candidates are vetted recurrently throughout the resettlement pro-

---

[4] The Government in its brief relies principally on precedents involving not *travel* into the United States but *immigration* into the United States, a very different set of laws and processes that raise a host of different concerns.

cess, as "pending applications continue to be checked against terrorist databases, to ensure new, relevant terrorism information has not come to light."[5] By the time refugees referred by the United Nations High Commissioner for Refugees ("UNHCR") are approved for resettlement in the United States, they have been reviewed not only by UNHCR but also by the National Counterterrorism Center, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of Defense, the Department of State and the U.S. intelligence community.[6] Under current vetting procedures, refugees often wait eighteen to twenty-four months to be cleared for entry into the United States; fewer than one percent were settled in any single country in 2015. And because refugees do not decide if, where and when they will be resettled, the odds that any terrorist posing as a refugee will be resettled in the United States are vanishingly small.

As a result of all of these protections, from 1975 to the end of 2015, over three million refugees have

---

[5] Amy Pope, *The Screening Process for Refugee Entry into the United States* (Nov. 20, 2015).

[6] For Syrian applicants, the Department of Homeland Security recently added a layer of enhanced review that involves collaboration between the Refugee, Asylum, and International Operations Directorate and the Fraud Detection and National Security Directorate. Among other measures, this review provided additional, intelligence-driven support to refugee adjudicators that U.S. officials could then use to more precisely question refugees during their security interviews. *See* U.S. Dep't of State, *The Refugee Processing and Screening System*, https://www.state.gov/documents/organization/266671.pdf; Andorra Bruno, *Syrian Refugee Admissions and Resettlement in the United States: In Brief*, Cong. Research Serv., 4-5 (Sept. 16, 2016).

been admitted to the United States. Despite the vast number of admitted refugees, no refugee has killed an American in a terrorist attack in the United States since the modern refugee vetting system began in 1980.[7] More than 18,000 Syrian refugees were resettled in the United States between October 1, 2011 and December 31, 2016, and we are unaware of a single one who has been detained due to a connection with terror.[8]

The Government now insists that the "bona fide relationship" requirement must be superimposed on these detailed existing vetting procedures to block even those with formal assurances from a U.S. based resettlement agency from entering the country. But this claim ignores the reality that *all* refugees in the U.S. Refugee Admissions Program develop close bona fide relationships with U.S.-based entities by virtue of the refugee process, and in some cases well before a formal assurance of admittance is provided. The decision to admit individual refugees, once they are screened, depends on the U.S. Government's assessment that an agency in the U.S. is prepared to handle the particularized and often unique cultural, medical and familial needs of individual refugees. This is a careful process of matching individuals to resources before a refugee is admitted. It is that process—conducted before admission and in order to proceed to admission—that creates the bona fide relationship called for by this Court's June 26, 2017 ruling.

---

[7] Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, Cato Institute (Sept. 13, 2016).

[8] Migration Policy Institute, *Syrian Refugees in the United States* (January 12, 2017).

The relationship between refugees who have received formal assurances from resettlement agencies and U.S. persons and entities is *personal and direct*. That relationship has become intense and close by the time a refugee has advanced to the formal assurance stage in the process. The relationship is *formal, documented, and formed in the ordinary course* of the existing refugee process. And such a relationship exists only for a *subset* of many refugees who might wish to come to this country. By the time refugees have made their way through this intensive vetting process, and have been formally admitted here, they have necessarily acquired the requisite bona fide relationship with the United States.

Simply put, over the years, the United States has developed a system that is an exemplar for establishing a bona fide relationship between U.S. entities and a foreign national seeking admission as a refugee. To be sure, the U.S. Government serves as an intermediary for part of that relationship; but if anything, that only makes the relationship stronger and more robust, leads to far greater security assurances, and avoids even the slightest of risks that the relationship is facile, fraudulent, or structured to avoid the scrutiny of the U.S. government. The current refugee resettlement system comes far closer to the spirit of this Court's June 26, 2017 ruling than the Government's arbitrary imposition of new and unwarranted requirements on that process.

Finally, it should be clear to all that at bottom, the refugee resettlement program is a humanitarian assistance program. It was not set up to benefit relatives of Americans citizens or residents, nor to serve the employment or educational needs of American companies or institutions. It was instead established

to further the noble and historical American tradition of aiding people fleeing persecution. Of course, this includes people with relatives and other prior connections to the United States, but it also includes people who, before having their case considered, have had little, if any, contacts with the United States and its citizens. Whatever the Government's rationale may be for seeking to exclude refugees who have secured formal assurances from a U.S.-based resettlement agency, that rationale cannot plausibly rest on national security imperatives.

CONCLUSION

For the foregoing reasons, the Court should deny the petitioners' motion.

Respectfully submitted,

JONATHAN FREIMAN
TAHLIA TOWNSEND
Wiggin and Dana LLP
265 Church Street
P.O. Box 1832
New Haven, CT
06508-1832
(203) 498-4584

WILLIAM J. MURPHY
JOHN J. CONNOLLY
Zuckerman Spaeder LLP
100 E. Pratt St.
Suite 2440
Baltimore, MD 21202
(410) 332-0444

HAROLD HONGJU KOH
Counsel of Record
HOPE METCALF
Rule of Law Clinic
Yale Law School
127 Wall Street
P.O. Box 208215
New Haven, CT
06520-8215
(203) 432-4932
harold.koh@yale.edu

July 18, 2017

Counsel for Amici Curiae

APPENDIX

APPENDIX

List of *Amici Curiae*

1. Madeleine K. Albright served as Secretary of State from 1997 to 2001. A refugee and naturalized American citizen, she served as U.S. Permanent Representative to the United Nations from 1993 to 1997. She has also been a member of the Central Intelligence Agency External Advisory Board since 2009 and of the Defense Policy Board since 2011, in which capacities she has received assessments of threats facing the United States.

2. General (ret.) John R. Allen, USMC, served as Special Presidential Envoy for the Global Coalition to Counter ISIL from 2014 to 2015. Previously, he served as Commander of the International Security Assistance Force and U.S. Forces Afghanistan.

3. Rand Beers served as Deputy Homeland Security Advisor to the President of the United States from 2014 to 2015.

4. Daniel Benjamin served as Ambassador-at-Large for Counterterrorism at the U.S. State Department from 2009 to 2012.

5. Antony Blinken served as Deputy Secretary of State from 2015 to January 20, 2017. He also served as Deputy National Security Advisor to the President of the United States from 2013 to 2015.

6. R. Nicholas Burns served as Under Secretary of State for Political Affairs from 2005 to 2008. He previously served as U.S. Ambassador to NATO and as U.S. Ambassador to Greece.

7. William J. Burns served as Deputy Secretary of State from 2011 to 2014. He previously served as Under Secretary of State for Political Affairs from 2008 to 2011, as U.S. Ambassador to Russia from 2005 to 2008, as Assistant Secretary of State for Near Eastern Affairs from 2001 to 2005, and as U.S. Ambassador to Jordan from 1998 to 2001.

8. James Clapper served as U.S. Director of National Intelligence from 2010 to January 20, 2017.

9. David S. Cohen served as Under Secretary of the Treasury for Terrorism and Financial Intelligence from 2011 to 2015 and as Deputy Director of the Central Intelligence Agency from 2015 to January 20, 2017.

10. Bathsheba N. Crocker served as Assistant Secretary of State for International Organization Affairs from 2014 to 2017.

11. Ryan Crocker served as U.S. Ambassador to Afghanistan from 2011 to 2012, U.S. Ambassador to Iraq from 2007 to 2009, U.S. Ambassador to Pakistan from 2004 to 2007, U.S. Ambassador to Syria from 1998 to 2001, U.S. Ambassador to Kuwait from 1994 to 1997, and U.S. Ambassador to Lebanon from 1990 to 1993.

12. Daniel Feldman served as U.S. Special Representative for Afghanistan and Pakistan from 2014 to 2015, Deputy U.S. Special Representative for Afghanistan and Pakistan from 2009 to 2014, and previously Director for Multilateral and Humanitarian Affairs at the National Security Council.

13. Jonathan Finer served as Chief of Staff to the Secretary of State from 2015 until January 20, 2017, and Director of the Policy Planning Staff at the U.S. State Department from 2016 until January 20, 2017.

14. Michèle Flournoy served as Under Secretary of Defense for Policy from 2009 to 2013.

15. Robert S. Ford served as U.S. Ambassador to Syria from 2011 to 2014, as Deputy Ambassador to Iraq from 2009 to 2010, and as U.S. Ambassador to Algeria from 2006 to 2008.

16. Josh Geltzer served as Senior Director for Counterterrorism at the National Security Council from 2015 to 2017. Previously, he served as Deputy Legal Advisor to the National Security Council and as Counsel to the Assistant Attorney General for National Security at the Department of Justice.

17. Suzy George served as Deputy Assistant to the President and Chief of Staff and Executive Secretary to the National Security Council from 2014 to 2017.

18. Phil Gordon served as Special Assistant to the President and White House Coordinator for the Middle East, North Africa and the Gulf from 2013 to 2015, and Assistant Secretary of State for European and Eurasian Affairs from 2009 to 2013.

19. Avril D. Haines served as Deputy National Security Advisor to the President of the United States from 2015 to January 20, 2017. From 2013 to 2015, she served as Deputy Director of the Central Intelligence Agency.

20. General (ret.) Michael V. Hayden, USAF, served as Director of the Central Intelligence Agency from 2006 to 2009. From 1995 to 2005, he served as Director of the National Security Agency.

21. Heather A. Higginbottom served as Deputy Secretary of State for Management and Resources from 2013 to 2017.

22. Christopher R. Hill served as Assistant Secretary of State for East Asian and Pacific Affairs from 2005 to 2009. He also served as U.S. Ambassador to Macedonia, Poland, the Republic of Korea, and Iraq.

23. John F. Kerry served as Secretary of State from 2013 to January 20, 2017.

24. Prem Kumar served as Senior Director for the Middle East and North Africa on the National Security Council staff of the White House from 2013 to 2015.

25. Sen. Richard Lugar served as U.S. Senator for Indiana from 1977 to 2013, and as Chairman of the Senate Committee on Foreign Relations from 1985 to 1987 and 2003 to 2007, and as ranking member of the Senate Committee on Foreign Relations from 2007 to 2013.

26. John E. McLaughlin served as Deputy Director of the Central Intelligence Agency from 2000 to 2004 and as Acting Director in 2004. His duties included briefing President-elect Bill Clinton and President George W. Bush.

27. Lisa O. Monaco served as Assistant to the President for Homeland Security and Counterterrorism and Deputy National Security Advisor from 2013 to January 20, 2017.

28. Janet A. Napolitano served as Secretary of Homeland Security from 2009 to 2013.

29. James C. O'Brien served as Special Presidential Envoy for Hostage Affairs from 2015 to January 20, 2017. He served in the State Department from 1989 to 2001, including as Principal Deputy Director of Policy Planning and as Special Presidential Envoy for the Balkans.

30. Matthew G. Olsen served as Director of the National Counterterrorism Center from 2011 to 2014.

31. Leon E. Panetta served as Secretary of Defense from 2011 to 2013. From 2009 to 2011, he

served as Director of the Central Intelligence Agency.

32. Jeffrey Prescott served as Special Assistant to the President and Senior Director for Iran, Iraq, Syria and the Gulf States from 2015 to 2017.

33. Samantha J. Power served as U.S. Permanent Representative to the United Nations from 2013 to January 20, 2017. From 2009 to 2013, she served as Senior Director for Multilateral and Human Rights on the National Security Council.

34. Susan E. Rice served as U.S. Permanent Representative to the United Nations from 2009 to 2013 and as National Security Advisor from 2013 to January 20, 2017.

35. Anne C. Richard served as Assistant Secretary of State for Population, Refugees and Migration from 2012 to January 20, 2017.

36. Kori Schake served as the Deputy Director for Policy Planning at the U.S. State Department from December 2007 to May 2008. Previously, she was the director for Defense Strategy and Requirements on the National Security Council in President George W. Bush's first term.

37. Eric P. Schwartz served as Assistant Secretary of State for Population, Refugees and Migration from 2009 to 2011. From 1993 to 2001, he was responsible for refugee and humanitarian issues on the National Security Council, ultimately serving as Special Assistant to the President for National Se-

curity Affairs and Senior Director for Multilateral and Humanitarian Affairs.

38. Wendy R. Sherman served as Under Secretary of State for Political Affairs from 2011 to 2015.

39. Vikram Singh served as Deputy Special Representative for Afghanistan and Pakistan from 2010 to 2011 and as Deputy Assistant Secretary of Defense for Southeast Asia from 2012 to 2014.

40. Jeff Smith served as General Counsel of the Central Intelligence Agency from 1995 to 1996. Previously, he served as General Counsel of the Senate Armed Services Committee.

41. James B. Steinberg served as Deputy National Security Adviser from 1996 to 2000 and as Deputy Secretary of State from 2009 to 2011.

42. William Wechsler served as Deputy Assistant Secretary for Special Operations and Combating Terrorism at the U.S. Department of Defense from 2012 to 2015.

43. Samuel M. Witten served as Principal Deputy Assistant Secretary of State for Population, Refugees, and Migration from 2007 to 2010. From 2001 to 2007, he served as Deputy Legal Adviser at the State Department.

RECORD AND BRIEFS
Supreme Court
MOTION FILED
JUL 18 2017

No. 16-1540

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Applicants,

v.

HAWAII, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE INTERNATIONAL REFUGEE ASSISTANCE PROJECT AND HIAS, INC, IN SUPPORT OF RESPONDENTS

KAREN C. TUMLIN
NICHOLAS ESPÍRITU
MELISSA S. KEANEY
ESTHER SUNG
MARIELENA HINCAPIÉ
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 1600
Los Angeles, CA 90010

JUSTIN B. COX
NATIONAL IMMIGRATION LAW CENTER
1989 College Ave. NE
Atlanta, GA 30317

MATEO CABALLERO
ACLU OF HAWAI'I FOUNDATION
10081 P.O. Box 3410
Honolulu, HI 96801

MARIKO HIROSE
Counsel of Record
REBECCA HELLER
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
40 Rector Street, 9th Floor
New York, NY 10006
(646) 459-3044
mhirose@refugeerights.org

OMAR C. JADWAT
LEE GELERNT
HINA SHAMSI
HUGH HANDEYSIDE
SARAH L. MEHTA
SPENCER E. AMDUR
DAVID K. HAUSMAN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

DAVID COLE
DANIEL MACH
HEATHER L. WEAVER
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street NW
Washington, DC 20005

CECILLIA D. WANG
CODY H. WOFSY
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, *amici* make the following disclosures:

1) The parent corporation of *amicus* International Refugee Assistance Project is the Urban Justice Center, Inc.

2) *Amicus* HIAS, Inc. does not have parent corporations.

3) No publicly held company owns ten percent or more of the stock of any *amicus* or its parent corporation.

MOTION FOR LEAVE TO FILE

The International Refugee Assistance Project and HIAS, Inc. move this Court for leave to file the enclosed brief as *amici curiae* in support of respondents without ten days' advance notice to the parties, as is ordinarily required by Supreme Court Rule 37.2(a). In light of the extremely expedited nature of the government's Motion for Clarification, it was not feasible to give ten days' notice. All parties have consented in writing to the filing of this brief without such notice.

Amici are U.S.-based non-profit entities that provide resettlement and legal services to refugees and other foreign nationals. Both are plaintiffs-respondents in *Trump v. International Refugee Assistance Project*, No. 16-1436 (Stay Application No. 16A1190). As set forth in the accompanying brief, *amici* seek to explain both the nature of their relationships with certain refugees that the government has sought to exclude, and the types of harm they would suffer were this Court to grant the government's Motion for Clarification.

For the foregoing reasons, pursuant to this Court's Rules 21.2(b) and 37.1, *amici* respectfully request that the Court grant this motion for leave to file the accompanying *amicus* brief.

Respectfully submitted,

Karen C. Tumlin
Nicholas Espíritu
Melissa S. Keaney
Esther Sung
Marielena Hincapié

Mariko Hirose
Counsel of Record
Rebecca Heller
Mark Wasef
INTERNATIONAL REFUGEE

NATIONAL IMMIGRATION
LAW CENTER
3435 Wilshire
Boulevard, Suite 1600
Los Angeles, CA 90010

Justin B. Cox
NATIONAL IMMIGRATION
LAW CENTER
1989 College Ave. NE
Atlanta, GA 30317

Mateo Caballero
ACLU OF HAWAI'I
FOUNDATION
10081 P.O. Box 3410
Honolulu, HI 96801

ASSISTANCE PROJECT
40 Rector Street, 9th Floor
New York, NY 10006
646-459-3044
mhirose@refugeerights.org

Omar C. Jadwat
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
Spencer E. Amdur
David K. Hausman
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

David Cole
Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street NW
Washington, DC 20005

Cecillia D. Wang
Cody H. Wofsy
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

Dated: July 18, 2017

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

MOTION FOR LEAVE TO FILE ii

TABLE OF AUTHORITIES v

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

BACKGROUND 4

ARGUMENT 9

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT RESETTLEMENT AGENCIES HAVE BONA FIDE RELATIONSHIPS WITH REFUGEES FOR WHOM THEY HAVE PROVIDED A FORMAL ASSURANCE OF SPONSORSHIP 9

II. THE DISTRICT COURT'S ORDER AVOIDS SEVERE, UNNECESSARY, AND IRREPARABLE HARM TO FULLY VETTED REFUGEES. 15

III. THE DISTRICT COURT'S ORDER STILL ALLOWS THE GOVERNMENT TO APPLY THE BAN TO REFUGEES WITHOUT BONA FIDE RELATIONSHIPS TO INDIVIDUALS OR ENTITIES IN THE UNITED STATES 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Exodus Refugee Immigration, Inc. v. Pence, 165 F. Supp. 3d 718 (S.D. Ind. 2016), *aff'd*, 838 F.3d 902 (7th Cir. 2016) 10, 12

Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977) 11

OTHER AUTHORITIES

American Program Bureau: Speaking to the World, https://www.apbspeakers.com 14

Karoun Demirjian et al., *"Refugee Processing Has Ground to a Halt": A Group of Senators Wants to Know Why*, Wash. Post, May 4, 2017 18

Phillip Connor et al., *U.S. on Track to Reach Obama Administration's Goal of Resettling 110,000 Refugees This Year*, Pew Research Center (Jan. 20, 2017), http://pewrsr.ch/2jwYQvg 18

The Common Application, Inc., *Fact Sheet* (2016), http://www.commonapp.org/about-us/fact-sheets 14

INTEREST OF *AMICI CURIAE*[1]

Amici are U.S.-based non-profit organizations that provide a variety of services to refugees and other foreign nationals seeking to resettle in the United States. Both are plaintiffs-respondents in *Trump v. International Refugee Assistance Project*, No. 16-1436 (Stay Application No. 16A1190).

HIAS, founded as the Hebrew Immigrant Aid Society, is a non-profit organization whose mission is to rescue people whose lives are in danger and help them resettle in the United States. HIAS is the global refugee organization of the American Jewish community. Its clients include both refugees and their families, both in the United States and abroad. HIAS is one of nine non-profit organizations in the United States that serve as resettlement agencies for the U.S. Refugee Admissions Program ("USRAP"). HIAS has been providing resettlement services to refugees since 1881.

The International Refugee Assistance Project ("IRAP") is a non-profit organization that provides direct legal services to refugees and others seeking to escape violence and persecution, as well as to their U.S.-based family members. Its staff and pro bono volunteers represent and work directly with individuals abroad throughout their application, travel, and resettlement processes.

---

[1] *Amici* have moved this Court for leave to file this *amicus* brief in support of respondents without ten days' advance notice to the parties, as is ordinarily required by Supreme Court Rule 37.2(a). No party has authored this brief in whole or in part, and no one other than *amici*, their members, and their counsel have paid for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In its June 26 decision denying in part and granting in part the government's request for a stay of the district court's injunction, this Court carefully distinguished between those non-citizens who have a "bona fide relationship" with a U.S. person or entity, and those who do not. It did so based on a balancing of the equities, finding that where such a relationship exists, the harm to U.S. persons and entities warrants the injunction's protection. With respect to entities, the Court stated that to be "bona fide," the relationship need only be "formal, documented, and formed in the ordinary course" of business. *IRAP*, slip op. at 12. As an example, it cited an invitation to give a lecture.

In implementing the Court's stay order, however, the government decided that the relationship formed between a U.S.-based resettlement agency and a refugee for whom it has provided a formal assurance of resettlement assistance is not "bona fide." As the district court correctly held, that decision was contrary to the text and reasoning of this Court's order. Mot. Add. 17 ("An assurance from a United States refugee resettlement agency, in fact, meets each of the Supreme Court's touchstones: it is formal, it is a documented contract, it is binding, it triggers responsibilities and obligations, including compensation, it is issued specific to an individual refugee only when that refugee has been approved for entry by the Department of Homeland Security, and it is issued in the ordinary course, and historically has been for decades.").

The government's current motion improperly attempts to bypass the court of appeals and have this Court review the district court's decision in the first instance. It should be rejected as premature. In the event that the Court decides to address the merits, however, this *amicus* brief explains why the government's application of the Executive Order to refugees with formal assurances from U.S. resettlement agencies is wrong.

Refugees who have been approved and fully vetted by the U.S. government, and then assured for resettlement by a U.S. non-profit entity, account for about fifteen percent of the refugees in the USRAP pipeline. The relationship between a resettlement agency and a refugee to whom it formally assures resettlement assistance is extensive, intimate, and formally documented. Formal assurances trigger extensive client-specific efforts by resettlement agencies and their community partners. They are issued at the conclusion of a long and arduous refugee admission process involving multiple layers of security checks and a medical screening.

Banning refugees who have these relationships with U.S. resettlement agencies will cause concrete harm to those and other U.S. entities. The resettlement agencies are not government proxies as the government suggests, Br. 21-22, but independent entities with long-standing missions to serve refugees that pre-date (often by decades) the government's involvement in refugee resettlement. Providing these services to individual refugees is the organizations' reason for being. Suspending the entry of refugees whose resettlement has been assured by entities like HIAS would inflict serious harm on the entities'

operations and missions, harm that will compound over time as refugees' various security checks and clearances begin to expire.

At the same time, recognizing assurances as giving rise to a "bona fide relationship" does not negate the Court's distinction between noncitizens with and without bona fide relationships. Unless they have some other connection to the United States, the government may continue to apply Section 6 during its effective period to the more than 175,000 refugees who are at an earlier stage in the process and have not received formal assurances from a U.S. entity. Thus, the Executive Order will have real consequences for many noncitizens abroad, but the injunction continues to provide vital protection for those with a relationship to a U.S. entity that is "formal, documented, and formed in the ordinary course." *Id.* at 12. That is precisely the "equitable judgment" reflected in this Court's opinion. *Id.* at 10.

BACKGROUND

The process that a refugee must endure to apply for and receive resettlement in the United States is long and arduous, typically lasting between eighteen and twenty-four months. D. Ct. Doc. 297-3 (Declaration of Mark Hetfield ¶¶ 6-21); D. Ct. Doc. 336-3 (Supplemental Declaration of Mark Hetfield ¶¶ 11-16); D. Ct. Doc. 301-1 (Declaration of Lawrence E. Bartlett ¶¶ 7-16). Formal assurance, which the district court held constitutes a bona fide relationship, is one of the very last steps, occurring after refugees have been vetted and just before they travel to the United States.

The extensive pre-assurance screening process generally starts with the refugee registering with the United Nations High Commissioner for Refugees ("UNHCR") in the country to which he or she has fled. D. Ct. Doc. 301-1 (Bartlett Decl. ¶ 8). If the UNHCR determines after an interview and review of documents that the applicant meets the United States' criteria for resettlement consideration and presents no disqualifying information, the UNHCR refers the case to a U.S. embassy. The embassy then transfers the case to one of nine Resettlement Support Centers across the world for further processing. *Id.* ¶ 9. These Centers process refugee applications, prepare case files, and initiate security checks. *Id.* ¶ 10. Once the case files are prepared, the applicant interviews with the U.S. Citizenship and Immigration Services to establish eligibility for refugee status and resettlement in the United States. *Id.* ¶ 12. If the refugee is eligible, the case proceeds through multiple layers of security and medical screening, most of which apply separately to every member of the family in the refugee application, including children. *Id.* ¶¶ 12-13; D. Ct. Doc. 336-3 (Hetfield Supp. Decl. ¶¶ 11-16) (detailing the various steps including an Inter-Agency Check involving numerous U.S. intelligence agencies).

Only after clearing these hurdles does a refugee obtain a "sponsorship assurance" from one of nine private non-profit organizations in the United States known as "resettlement agencies." D. Ct. Doc. 301-1 (Bartlett Decl. ¶ 14); D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 16). *Amicus* HIAS is one of these nine resettlement agencies. On a weekly basis, the resettlement agencies review the case files of specific refugees who are seeking sponsorship assurance to evaluate the fit

between the needs of each refugee and the resources of the local communities where the agencies' affiliates are based. U.S. Dep't of State, *The Reception and Placement Program*[2]; D. Ct. Doc. 301-1 (Bartlett Decl. ¶ 18); D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 16). If, after evaluating the refugee's needs and the capacity of its own network of affiliates, a resettlement agency decides that one of its affiliates can sponsor the refugee, it provides a written "assurance." *Ibid.*; D. Ct. Doc. 301-1 (Bartlett Decl. Ex. 3 (attaching sample form of an assurance)). An assurance is a formal, documented commitment by the resettlement agency and its affiliate (together, "resettlement entities") to arrange for the reception of the refugee and provide individualized, specialized assistance before and after his or her arrival in the United States. D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 16-17).

Once a resettlement agency provides an assurance, information about the agency is communicated to the refugee, *see* U.S. Dep't of State, *The Reception and Placement Program*, *supra*, and the resettlement entities begin the process of preparing for the refugee's arrival. D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 17). Once they receive an assurance, after selling possessions and terminating any leases and employment, refugees typically travel to the United States within two to six weeks. *Id.* at 18.

During that period, resettlement agencies complete an intensive process to welcome the refugee to the United States. In advance of the refugee's arrival, they undertake substantial preparations to

---

[2] *Available at* https://www.state.gov/j/prm/ra/receptionplacement/index.htm.

assure that there will be adequate living arrangements and assistance for a smooth transition. *Id.* ¶ 20. The resettlement entities ensure that an arriving refugee is greeted at the airport, transported to already-furnished living quarters, provided with food and clothing, and connected to necessary medical care. *Id.* ¶¶ 19-21; D. Ct. Doc. 301-1 (Bartlett Decl. Ex. 2 (outlining entities' obligations for pre-arrival and post-arrival services)). Resettlement entities also provide case management services, which may include an initial safety orientation, facilitating school enrollment, and assisting with employment and public benefits. D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 20). Preparation for a refugee's arrival thus involves a substantial investment of time and resources by a resettlement agency.

On June 26, 2017, this Court issued an opinion granting a limited stay in this case and in *Trump v. IRAP*, in which *amici* are among the respondents. The Court held that the Executive Order's bans could be imposed only as to individuals "who lack any bona fide relationship with a person or entity in the United States," and further explained that "[t]he facts of these cases illustrate the sort of relationship that qualifies." *IRAP*, slip op. at 9, 12. The Court thus left in place the lower courts' nationwide injunctions against the enforcement of the relevant provisions of the Executive Order "with respect to respondents and those similarly situated." *Id.* at 9. As to U.S. entities, the Court explained that to qualify, a relationship must be "formal, documented, and formed in the ordinary course, rather than for the purpose of evading" the Order. *Id.* at 12.

Amici, like the *Hawai'i* plaintiffs, repeatedly sought to consult with the government in the days following this Court's opinion regarding the government's implementation of the partial stay. The government declined to do so, and instead simply provided *amici* with published guidance documents on the eve of its implementation of the partial ban. That guidance has since been repeatedly altered in belated recognition of multiple ways in which the government's implementation was inconsistent with this Court's order (all of which *amici* and the *Hawai'i* plaintiffs had pointed out to the government shortly after the Court issued its opinion).[3] Because the refugee provisions are enjoined only in the *Hawai'i* litigation, and because of *amici*'s specific interests and expertise regarding refugee issues, *amici* filed briefs in support of the *Hawai'i* plaintiffs in the district court below. *See* Mot. 9 n.2, 13 n.3.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT RESETTLEMENT

[3] For example, since it first issued guidance on June 29, the government has (1) reversed its initial position that fiancés are subject to the ban, (2) conceded that certain categories of refugees are categorically protected by the injunction, after initially omitting them from its list of protected categories, and (3) reversed its initial position that clients of legal services organizations categorically lack bona fide relationships with U.S. entities, but without publishing any superseding guidance on that issue.

AGENCIES HAVE BONA FIDE RELATIONSHIPS WITH REFUGEES FOR WHOM THEY HAVE PROVIDED A FORMAL ASSURANCE OF SPONSORSHIP.

1. The district court correctly found that, under this Court's order, the government cannot apply the Executive Order to bar entry of refugees who have received a formal assurance of sponsorship from a U.S. resettlement agency, because those refugees have a "bona fide relationship with a[n] . . . entity in the United States." *IRAP*, slip op. at 13. The government does not dispute that the relationship between a refugee and an assuring resettlement agency is "formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Executive Order]." *Id.* at 12; *see* D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 17) (describing the formation and documentation of the refugee-resettlement agency relationship). That is all that is required under this Court's opinion to warrant the protection of the injunction.

Moreover, the Court explained that the injunctions applied to both "respondents" and "parties similarly situated to them—that is, people or entities in the United States who have relationships with foreign nationals abroad." *IRAP*, slip op. at 10; *see id.* at 12 ("[T]he facts of *these cases* illustrate the sort of relationship that qualifies.") (emphasis added). *Amicus* HIAS is a respondent in *IRAP* and has relationships with refugees abroad for whom it has provided assurances. *See* Mot. 9 n.2, 20 n.6; *see also, e.g.*, Doc. No. 93, First Amended Complaint, *IRAP v.*

Trump, No. 17-cv-361 (D. Md. filed Mar. 10, 2017), ¶¶ 161-166 (discussing HIAS's assured clients).

2. The touchstone of this Court's equitable analysis was whether a U.S. individual or entity could "legitimately claim concrete hardship" if a noncitizen were to be excluded. It found such hardship to exist whenever a noncitizen has a credible claim of a "bona fide relationship" with a U.S. person or entity. *IRAP*, slip op. at 13. The government is simply wrong when it asserts, without citing anything in support, that "the exclusion of an assured refugee [cannot] plausibly be thought to 'burden' a resettlement agency . . . ." Mot. 22. In fact, the record demonstrates that resettlement agencies like HIAS experience concrete harm whenever the government excludes refugees for whom the agency has provided formal assurances and invested resources preparing for resettlement.

First, resettlement entities face potentially devastating economic harm. For each refugee they do not resettle, they lose the $950 that they are allocated to provide services for that particular person. D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 22); *cf. Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 730 (S.D. Ind. 2016) (holding that loss of funding to a resettlement non-profit is an injury for Article III purposes), *aff'd*, 838 F.3d 902 (7th Cir. 2016) (Posner, J.). In addition, if the refugee does not arrive in the United States, or is delayed in arriving, the entities lose the money and resources they have already expended in pre-arrival preparation, such as renting housing and arranging for basic necessities such as food, utilities, and medical care. D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 17-22); *cf. Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 262 (1977)

(recognizing economic injury based on resources already invested in a project). To give one specific example, HIAS had partnered with a synagogue and a church who raised funds to rent and furnish an apartment for a Syrian refugee family that it had assured—only to find out that the family may not arrive because of the government's interpretation of this Court's Order. D. Ct. Doc. 336-3 (Hetfield Supp. Decl. ¶ 9).

Resettlement entities face equally significant non-economic hardships when formally assured refugees are denied entry. Helping refugees find safety is their very reason for existing. That mission is often rooted in the core religious beliefs of an entity, its employees, and its affiliates. *See* D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 4) (explaining that HIAS's resettlement work is "an expression of[] the organization's sincere Jewish beliefs," and that failing to carry out that work "violates HIAS's deeply held religious convictions"). Moreover, the commitments that resettlement entities and their partners make to the refugees they assure are individualized and meaningful. In order to effectively resettle an assured refugee, entities must develop an understanding of the particular person or family they are assuring and mobilize a community—which could include entity staff, congregations, volunteers, local or ethnic leaders, school officials, landlords, and others—to receive them. Resettlement entities are thus invested in their assured refugees in both economic and non-economic ways.

These relationships are as "bona fide" and as close as the examples this Court cited as meriting protection—such as those between a university and an

admitted student, between a company and a hired employee, or between the organizer of an event and a lecturer. *IRAP*, slip op. at 12; *see also Exodus Refugee Immigration, Inc.*, 165 F. Supp. 3d at 732 (recognizing close relationship between resettlement non-profit and refugees that it had agreed to resettle). In all of these relationships, the U.S. entity chooses to form a relationship with a particular person, makes commitments, and invests resources preparing for the person's arrival. In fact, formal assurances are a deeper and longer-lasting relationship than a one-time invitation to lecture or admission to a short-term academic program.

3. The government does not dispute that the relationship between a resettlement agency and a refugee it sponsors is "formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Executive Order]." *IRAP*, slip op. at 12. Nor does it dispute that, if the government bans assured refugees, their resettlement entities will lose economic resources, waste the significant investments they have made preparing to help refugees adjust to life in the United States, and suffer non-economic harms to their mission and community relationships.

Instead, the government contends that its own part in the refugee resettlement process means that resettlement entities have *no* relationship with the refugees they select and commit to shepherd through the resettlement process. Mot. 2 (arguing that "[p]rior to the refugee's arrival, . . . the relationship is solely between the government and the agency"). That contention fundamentally misunderstands the entities' role in the resettlement process.

First, the government argues that the entity-refugee relationship is not "bona fide" because the assurance itself is technically an agreement between the entities and the federal government. Mot. 21-22. But the fact that the federal government has required resettlement agencies to provide assurances before allowing refugees to travel does not diminish the commitment that the entities make to the refugees themselves, the steps that the entities take in anticipation of refugees' arrival once the assurance is issued, or the hardship the entities experience if the refugees they have assured do not arrive. It does not matter *who* receives the formal documentation of the relationship—only that the relationship is "formal," "documented," and "formed in the normal course of business." *IRAP*, slip. op. at 12. The assurances provided by the resettlement agencies represent a connection to individual refugees that satisfies each of those requirements.

Second, the government finds it "[s]ignificant[]" that resettlement agencies often do not have any "direct contact" with the refugees prior to their arrival. Mot. 22. This is a red herring. Resettlement entities may not always interact directly with refugees prior to their arrival, but they do expend significant resources and marshal a host of individualized services for each refugee prior to arrival, based on personal information they receive about each refugee they agree to resettle. *See* Dep't of State, *The Reception and Placement Program*, *supra*. Refugees similarly receive information about the non-profit that has agreed to sponsor them. *See id.* This level of interaction is not meaningfully different from that involved in other protected bona fide relationships—for example, a college's decision to admit a perspective

student based solely on written application materials. [4] Indeed, nearly all of the entity relationships recognized by this Court's opinion share a similar structure to the assurance relationship. Just as the resettlement entity provides an assurance partly in anticipation of future resettlement activities, an employer makes a job offer in anticipation of the future work relationship, often based solely on the assurances of a third-party recruiter; a university admits a student in anticipation of the future study relationship; and *whoever* invites a lecturer does so in anticipation of the future relationship the lecturer will have with his or her as-yet unformed audience. The government's rule thus breaks faith with this Court's explanation of which entity relationships qualify.

Finally, the government insists that in addition to the criteria established by this Court, individuals must also demonstrate a "freestanding connection to resettlement agencies that is separate and apart from the Refugee Program." Mot. 22. That additional criterion is not only untethered to anything this Court said, it also ignores what USRAP is. Resettlement entities like HIAS formed relationships with individual refugees long before the Refugee Act of 1980. D. Ct. Doc. 297-3 (Hetfield Decl. ¶ 2) (stating

---

[4] Nor is it relevant that the communication is typically handled through a third party prior to the refugee's arrival. For example, speaking invitations for lecturers are often handled through third-party speaker bureaus, *see, e.g.*, American Program Bureau: Speaking to the World, https://www.apbspeakers.com, and individuals applying to college may do so through a third-party application processor, *see* The Common Application, Inc., *Fact Sheet* (2016) (describing third-party entity through which students can apply to college), http://www.commonapp.org/about-us/fact-sheets.

that HIAS has been providing refugee resettlement services since 1881). The government cannot be the sole source of relationships that were being formed for a hundred years before the Refugee Act. Through USRAP, Congress sought to recognize and support those relationships, *see, e.g.*, H.R. Rep. No. 608, 96th Cong., 1st Sess. 6 (1979) ("Refugee resettlement in this country has traditionally been carried out by private voluntary resettlement agencies. . . . The Congress recognizes that these agencies are vital to successful refugee resettlement."), not diminish them as the government tries to do here.

II. THE DISTRICT COURT'S ORDER AVOIDS SEVERE, UNNECESSARY, AND IRREPARABLE HARM TO FULLY VETTED REFUGEES.

The district court's order is not only correct, but avoids potentially catastrophic results for the refugees themselves. That is because refugees at this stage of the process have a set window to complete their travel—if they miss this window, the security and medical checks that they passed will begin to expire. D. Ct. Doc. 336-3 (Hetfield Supp. Decl. ¶¶ 12-16). Once a check expires, it must be re-initiated. *Id.* ¶ 17. But because each security check can take months or even years to complete, the expiration of even one can have a cascading effect, as other clearances expire while the first is being re-processed. *Id.* ¶ 19. As a result, even relatively short-term delays in the resettlement process reverberate for far longer.

The potentially devastating consequences of even a short travel delay further underlines that the equitable balance strongly favors exempting fully-

vetted, formally assured refugees from the ban. A decision not to protect relationships formed by assurances of sponsorship by U.S. resettlement entities would jeopardize the lives of the approximately 24,000 refugees who have already completed a stringent vetting process. D. Ct. Doc. 301-1 (Bartlett Decl. ¶ 17). And introducing any further delay into the process will likely result in at least one clearance expiring during the additional time. D. Ct. Doc. 336-3 (Hetfield Suppl. Decl. ¶ 18). A stay or reversal of the district court's order could therefore result in not only a temporary delay for many of these refugees, but a lifetime ban.

III. THE DISTRICT COURT'S ORDER STILL ALLOWS THE GOVERNMENT TO APPLY THE BAN TO REFUGEES WITHOUT BONA FIDE RELATIONSHIPS TO INDIVIDUALS OR ENTITIES IN THE UNITED STATES.

The government's concern that the district court's order "effectively eviscerates this Court's ruling," Mot. 14, is misplaced. This Court's ruling allowed the Executive Order to be implemented as to refugees whose exclusion would not harm any U.S. entities or persons, and the district court's ruling does the same. There are over 200,000 individuals currently in USRAP, and fewer than 24,000 have received assurances. The district court's recognition that a formal assurance represents a bona fide relationship thus has no effect on over 85 percent of refugees currently in USRAP.

The government nevertheless complains that the number of people who already have assurances

may exceed the number of people that it can schedule for travel before the end of the fiscal year on September 30, and that therefore the district court injunction does not as a practical matter allow it to apply the Executive Order to bar any refugees from entering the country. Mot. 24-25. This argument is triply flawed.

First, the equitable balance this Court struck did not turn on the number of people that did or did not have bona fide relationships with U.S. entities or individuals. Where a refugee's connection to an entity is formal, documented, and formed in the ordinary course, the government's desire to apply the ban is "outweigh[ed]" by the harm that the U.S. entity would suffer if its client is excluded. *IRAP*, slip op. at 10.

Second, the government's argument is framed as though Section 6 of the Order acts only upon the *entry* of refugees. But that is simply not so. The Order suspends for 120 days not just travel, but also "decisions on applications for refugee status," and the district court's ruling regarding assurances does *nothing* to disturb the application of Section 6 to such decisions prior to the (very late) assurance stage. The government's assertion that the district court's order renders the stay a "dead letter," Mot. 20, or ensures that it "covers virtually no refugee," Mot. 25, is plainly incorrect.

Third, through its control over the adjudication process and travel bookings, the government has *already* reduced the number of refugees who have been able to enter the United States by tens of thousands. On January 20, 2017, the United States was on pace to hit the existing admissions cap of 110,000 refugees for this fiscal year—meaning

approximately 9,000 refugees would be admitted every month.[5] Since then, however, the pace of booking refugees for travel has slowed considerably, to under 2,000 admissions per month. Karoun Demirjian et al., *"Refugee Processing Has Ground to a Halt": A Group of Senators Wants to Know Why*, Wash. Post, May 4, 2017.[6] As a result, even if all currently assured refugees are admitted this fiscal year, the government will still have admitted *forty thousand fewer refugees* than could have been admitted absent the bans. *Ibid.* ("[R]esettlement officials say that at the current pace, there is no way the country could take in more than about 65,000 refugees.").

Thus, if it addresses the merits, this Court should affirm the district court. Doing so would simply allow refugees who have already obtained assurances of sponsorship from U.S. resettlement entities and passed the rigorous vetting process to be welcomed into the country during this fiscal year, thus sparing the resettlement entities substantial, and concrete, hardships.

CONCLUSION

For these reasons, and the reasons urged by the respondents, *amici* ask that the Court deny the government's Motion for Clarification of June 26, 2017,

---

[5] Phillip Connor et al., *U.S. on Track to Reach Obama Administration's Goal of Resettling 110,000 Refugees This Year*, Pew Research Center (Jan. 20, 2017), http://pewrsr.ch/2jwYQvg.

[6] *Available at* https://www.washingtonpost.com/powerpost/refugee-processing-has-ground-to-a-halt-a-group-of-senators-want-to-know-why/2017/05/04/d49aee2a-30d6-11e7-9534-00e4656c22aa_story.html?utm_term=.a3d911535e3a.

Stay Ruling and Application for Temporary Administrative Stay of Modified Injunction.

Respectfully Submitted,

Karen C. Tumlin
Nicholas Espíritu
Melissa S. Keaney
Esther Sung
Marielena Hincapié
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 1600
Los Angeles, CA 90010

Justin B. Cox
NATIONAL IMMIGRATION LAW CENTER
1989 College Ave. NE
Atlanta, GA 30317

Mateo Caballero
ACLU OF HAWAI'I FOUNDATION
10081 P.O. Box 3410
Honolulu, HI 96801

Mariko Hirose
Counsel of Record
Rebecca Heller
Mark Wasef
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
40 Rector Street, 9th Floor
New York, NY 10006
646-459-3044
mhirose@refugeerights.org

Omar C. Jadwat
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
Spencer E. Amdur
David K. Hausman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

David Cole
Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, DC 20005

Cecillia D. Wang
Cody H. Wofsy
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

Dated: July 18, 2017

AND BRIEFS JUL 18 2017

NO. 16-1540 (16A1191)

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE LAW PROFESSORS SUPPORTING RESPONDENTS' OPPOSITION TO THE GOVERNMENT'S MOTION FOR CLARIFICATION AND APPLICATION FOR STAY OF MODIFIED INJUNCTION

JULY 18, 2017

MARK A. ARONCHICK
Counsel of Record
ROBERT A. WIYGUL
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200
maronchick@hangley.com

Counsel for Amici Curiae

Library of Congress

MOTION FOR LEAVE TO FILE

A group of law professors, who are scholars of immigration law and family law, respectfully move this Court for leave to file the accompanying brief, as amici curiae in support of respondents' opposition to the government's motion for clarification and application for stay of the district court's modified injunction, without 10 days' advance notice to the parties of amici's intent to file as ordinarily required by Supreme Court Rule 37.2(a).

The parties have consented in writing to the filing of the enclosed amicus brief.

1. Statement of Movants' Interest

Amici are scholars with expertise in immigration, family law, and constitutional law. The government's motion for clarification and application for stay presents the question of what constitutes a "bona fide relationship with a person or entity in the United States," the standard which, under this Court's June 26 Order, defines the appropriate scope of preliminary injunctions entered against certain sections of Executive Order 13,780. This interpretive issue lies at the intersection of immigration, family law, and constitutional law, and is one about which amici are deeply concerned. The enclosed brief applies amici's expertise by situating the Court's June 26 Order in the larger context of constitutional, statutory, and judge-made law recognizing the importance and weight of family relationships excluded from the government's extremely narrow definition of "bona fide relationship" – a classificatory scheme that cannot be reconciled

even with the specific immigration statutes that purportedly serve as its source. Amici's analysis identifies the concrete harms that persons in the United States will suffer as a result of the government's scheme, an essential consideration given the June 26 Order's appropriate concern with balancing the equities to determine the appropriate scope of preliminary injunctive relief pending further proceedings.

2. Statement Regarding Brief Form and Timing

Given the expedited consideration of this matter of significant national interest, amici respectfully request leave to file the enclosed brief supporting respondents and their opposition to the government's motion for clarification and application for stay without 10 days' advance notice to the parties of intent to file. The district court entered its modified injunction on July 13, 2017. The government's motion for clarification and application for stay in this Court were filed on June 15, 2017. Later the same day, this Court ordered a response to the government's filing by noon on June 18, 2017. This accelerated timing justifies the request to file the enclosed amicus brief supporting respondents' position without 10 days' advance notice to the parties of intent to file.

CONCLUSION

The Court should grant amici curiae leave to file the enclosed brief in support of respondents' opposition to the government's motion for clarification and application for stay of the district's court modified injunction.

Respectfully submitted,

MARK A. ARONCHICK
Counsel of Record
ROBERT A. WIYGUL
Hangley Aronchick Segal
Pudlin & Schiller
One Logan Square,
27th Floor
Philadelphia, PA 19103
(215) 568-6200
maronchick@hangley.com

Counsel for Amici Curiae

July 18, 2017

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 5

I. THIS COURT'S JUNE 26 ORDER REFLECTS A BALANCING OF EQUITIES BASED ON CONCRETE HARMS TO PERSONS AND ENTITIES IN THE UNITED STATES 8

A. This Court's precedents affirming the constitutional significance of familial relationships beyond the nuclear family should weigh heavily in the balancing of equities. 13

B. In implementing § 6, the government overlooks concrete harms to refugee agencies and family members of refugees in the United States. 16

II. THE GOVERNMENT OVERLOOKS FEDERAL STATUTORY RECOGNITION OF FAMILY RELATIONSHIPS THAT CAN BE THE BASIS OF CONCRETE HARMS FROM UNLAWFUL DENIALS OF ADMISSIONS TO THE UNITED STATES 19

CONCLUSION 21

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Ablang v. Reno,
52 F.3d 801 (9th Cir. 1995) 11

Adams v. Baker,
909 F.2d 643 (1st Cir. 1990) 11

American Academy of Religion v. Napolitano,
573 F.3d 115 (2d Cir. 2009) 11

Azizi v. Thornburgh,
908 F.2d 1130 (2d Cir. 1990) 11

Bustamante v. Mukasey,
531 F.3d 1059 (9th Cir. 2008) 11

Hawaii v. Trump,
859 F.3d 741 (9th Cir.), *cert. granted*,
137 S. Ct. 2080 (2017) 12

Hawaii v. Trump,
CV. No. 17-00050, 2017 WL 2989048
(D. Haw. July 6, 2017) 16

International Refugee Assistance Project v. Trump,
857 F.3d 554 (4th Cir.), *cert. granted*,
137 S. Ct. 2080 (2017) 12

Johnson v. Whitehead,
647 F.3d 120 (4th Cir. 2011) 11

Kerry v. Din,
135 S.Ct. 2128 (2015) 11

Kleindienst v. Mandel,
408 U.S. 753 (1972) ..... *passim*

Moore v. City of East Cleveland,
431 U.S. 494 (1977) ..... *passim*

Prince v. Massachusetts,
321 U.S. 159 (1944) 14

Troxel v. Granville,
530 U.S. 57 (2000) 2, 14, 15

Trump v. International Refugee Assistance Project,
137 S. Ct. 2080 (2017) ..... *passim*

Statutes

8 U.S.C. § 1183a 5, 21

42 U.S.C. § 671 19

Other Authorities

8 C.F.R. § 213a 5, 21

8 C.F.R. § 236.3 19

Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ..... *passim*

Michael Barbaro, *The Daily: Defining a 'Bona Fide' Family Relationship*, N.Y. Times, June 30, 2017, https://www.nytimes.com/2017/06/30/podcasts/the-daily/the-daily-bona-fide-trump-travel-ban.html 14

Miriam Jordan, *A Refugee Family Arrives in Arkansas, Before the Door Shuts*, N.Y. Times, July 13, 2017, https://www.nytimes.com/2017/07/13/us/trump-refugee-ban.html 17

INTEREST OF AMICI CURIAE

Amici curiae are leading scholars of immigration law and family law who are interested in the proper interpretation and application of U.S. laws as they concern Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017), and this Court's Order in *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2088–89 (2017) (per curiam) (the "June 26 Order"). This brief addresses issues specifically within amici's scholarly expertise. The Appendix to this brief contains biographical information on the amici, who are participating in their individual capacities and not as representatives of the institutions with which they are affiliated.[1]

SUMMARY OF THE ARGUMENT

Amici, experts in immigration law and family law, write to emphasize how the government's position exists in profound tension with constitutional tradition and statutory law protecting close familial relationships beyond the nuclear

---

[1] No counsel for any party authored any portion of this brief, nor did any person or entity other than amici curiae or their counsel make any monetary contribution to the preparation or submission of this brief. The parties have consented in writing to the filing of this brief. A motion seeking leave to file this brief is being filed concurrently.

family. This brief addresses three primary points. First, while foreign nationals residing abroad have no constitutional right to enter the United States, Americans do have justiciable constitutional interests in seeking their admission. *Kleindienst v. Mandel*, 408 U.S. 753 (1972), instructs courts to defer to the government's admissions decisions, but only when there is a "facially legitimate and bona fide" reason supporting such decisions. At the preliminary injunction stage, the June 26 Order properly sought to balance the equities by preserving the *status quo ante* for persons and entities in the United States that would suffer harm from an unlawful decision to deny admission to a noncitizen. The Order's touchstone, therefore, is whether "any American party" would suffer "concrete hardship" should travelers be unlawfully excluded. *See* 137 S. Ct. at 2088–89.

This Court's precedents affirming the constitutional significance of familial relationships beyond the nuclear family illustrate how the government's narrow interpretation of "close familial relationships" causes such concrete hardship to individuals in the United States. In cases such as *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Troxel v. Granville*, 530 U.S. 57 (2000), the Court has recognized the central importance of close relatives such as grandparents, aunts, uncles, nieces,

nephews, and cousins, especially to children who have lost parents and families who have suffered tragedy and adversity.

The government's interpretation of the June 26 Order focuses myopically on bilateral contacts between refugees and agencies, in that the government overlooks these agencies' devotion of considerable resources to resettling these refugees, even if the federal government has been involved in forming that relationship. The government's interpretation also erects an arbitrary barrier to entry for refugees with bona fide family ties in the United States. The government's narrow definition of "close familial relationship" would exclude nieces, nephews, and grandchildren who have undergone extensive vetting through the refugee program, threatening the very vulnerable children and families who—this Court has repeatedly recognized—are often most reliant on close relatives when they have suffered the loss of their parents or other grievous hardships.

Second, the government's analysis of the Immigration and Nationality Act (INA) is either flawed or irrelevant or both. The government erroneously suggests that INA provisions regarding immigrant visa ("green card") petitions establish

traditional, nuclear familial relationships as the kind of "bona fide relationships" exempt from the travel ban, while INA provisions that recognize familial relationships for other purposes include expansive, nonnuclear familial relationships beyond the scope of "bone fide relationships" and therefore subject to the travel ban. This distinction has no bearing on the relevant inquiry, which is to identify the persons and entities in the United States that would suffer a concrete harm from an unlawful denial of admission. The class of affected Americans who could experience a concrete harm because of the government's overly narrow interpretation of "bona fide relationship" goes well beyond those who might petition for a relative through our admissions system. The travel ban sweeps in all visitors, including, for example, those entering on tourist visas to celebrate a wedding, mourn a death, receive care from a family member, or help care for a new baby or infirm relative.

Finally, even if the government were correct to use the immigrant visa provisions as a touchstone, its "nuclear family only" position is untenable. The INA clearly recognizes the interests of nonnuclear family members—such as grandparents and in-law relatives—who participate in the admission of noncitizens. Every sponsor who petitions for a noncitizen family member must assume financial

responsibility over the immigrant in the form of an affidavit of support. *See* 8 C.F.R. § 213a. If a sponsor dies after a family-based petition has been approved, the INA allows a broad range of relatives to become a "substitute sponsor," for the immigrant, including "a spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, or grandchild." *See* 8 U.S.C. § 1183a(f)(5)(B)(i)–(ii). This provision reflects Congress's understanding that Americans have an interest in the admission for permanent residence of members of their extended families.

ARGUMENT

This Court's June 26 Order upheld in substantial part the preliminary injunctions entered against Executive Order 13,780 by the United States District Court for the District of Hawaii and the United States District Court for the District of Maryland, each of which was sustained in substantial part on appeal by the United States Courts of Appeals for the Ninth Circuit and the Fourth Circuit, respectively. The government now returns to this Court to seek review of a subsequent order, issued on July 13, 2017, by the United States District Court for the District of Hawaii, clarifying the June 26 Order.

Amici write to apply their expertise in immigration law and family law to address two interlocking aspects of this Court's June 26 Order. First, we address the constitutional principles—drawn from precedents in both immigration law and family law—that recognize the interests of persons and entities inside the United States in the lawful administration of the immigration laws. Second, we address the federal statutes, especially the Immigration and Nationality Act, that recognize the relationships that noncitizens may have with persons and entities inside the United States.

We emphasize that these two aspects of this Court's Order are closely related in important ways that the government overlooks in mischaracterizing the relevant inquiry at this stage of this case. In particular, we have grave concerns that the government is attempting to separate the constitutional from the statutory, and to separate some parts of the statutes from others, in ways that distort the June 26 Order's purpose, rationale, and clear meaning. We also have grave concerns that the government is attempting to litigate the merits of this case rather than taking seriously this case's posture, which calls for balancing the equities to decide the scope of a preliminary injunction pending further proceedings. We believe that looking at this Court's June 26 Order as a whole—at both

constitutional and statutory considerations in the context of a preliminary injunction—makes it clear that the United States District Court for the District of Hawaii has applied this Court's Order faithfully.[2]

---

[2] The government repeatedly invokes the specter that the preliminary injunction—if applied to all noncitizens with a bona fide relationship with a person or entity inside the United States—would render the pertinent sections of Executive Order 13,780 "inoperative." Motion for Clarification of June 26, 2017, Stay Ruling and Application for Temporary Administrative Stay of Modified Injunction ("Motion for Clarification") at 23–25. This characterization is misleading. It first assumes without justification that this Court's June 26 Order was a near-complete affirmation of the government's position on the merits of the Executive Order. In fact, the Order upheld the preliminary injunctions as to a significant number of people and entities inside the United States—and thus as to a significant number of noncitizens. The government's characterization then assumes, also without justification, that this Court's Order must be applied in a way that preserves as much of Executive Order 13,780 as possible. Instead, the only fair and accurate way to define "bona fide relationship with a person or entity in the United States" is to identify relationships that would give rise to "concrete harms" that would prompt the *Mandel* inquiry into a "facially legitimate and bona fide reason." *See Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). It skews application of this Court's June 26 Order to attribute to this Court a purpose to allow as much of the Executive Order as possible to go into effect.

I. This Court's June 26 Order reflects a balancing of equities based on concrete harms to persons and entities in the United States.

We begin with the core of this Court's June 26 Order: that pending further proceedings, the preliminary injunctions issued by the two United States District Courts should continue to block sections 2(c), 6(a), and 6(b) of the Executive Order because implementing those sections would cause concrete harm to people or entities inside the United States. This core principle is evident from the Order's discussion of equities in Part II-B. In explaining its decision to preserve the status quo for noncitizens with a "bona fide relationship with a person or entity in the United States," the Order emphasized the "concrete burdens" that would be imposed on U.S. persons and entities by admission restrictions that may be unlawful. *See* 137 S. Ct. at 2087–88. Relatedly, the Order upheld the preliminary injunctions that protect "people or entities in the United States who have relationships with foreign nationals abroad, and whose rights might be affected if those foreign nationals were excluded." *Id.* at 2087.

This key part of the Court's analysis is based on established principles of constitutional law as

applied in immigration law cases, with particular emphasis on *Kleindienst v. Mandel*, 408 U.S. 753 (1972). In that case, the central question was whether the government's decision to deny admission to the Belgian Marxist scholar Ernst Mandel was unlawful because it violated the First Amendment right of persons in the United States to meet and speak with him. This Court held that the government need only base its denial on a "facially legitimate and bona fide reason." The Court found that the government had done so, so the Court rejected plaintiffs' constitutional challenges. *See* 408 U.S. at 769–70.

When courts are called upon to decide the merits of constitutional challenges to the government's decisions to deny admission to noncitizens, *Mandel* is typically cited for its degree of deference to the federal government. The requirement of a "facially legitimate and bona fide" reason for a denial of admission is a standard that the government will often meet, as it did in *Mandel*. But where, as here, the task at hand is to balance equities in the preliminary injunction context, the significance of *Mandel* lies in another, equally important aspect of that decision.

In *Mandel*, this Court started by observing: "It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of

entry to this country as a nonimmigrant or otherwise." 408 U.S. at 762. But this Court next recognized that the other plaintiffs—all individuals in the United States—had constitutional claims that courts must hear and adjudicate. This Court was especially concerned that denying these plaintiffs the opportunity to hear, meet, and speak with Mandel in person would infringe on their First Amendment rights. Accordingly, this Court discussed extensively whether, for First Amendment purposes, communications with Mandel via "tapes or telephone hook-ups[] readily supplant his physical presence." 408 U.S. at 765. Emphasizing "what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning," *id.*, this Court recognized that the plaintiffs' constitutional rights were in jeopardy. *See id.*

On the particular facts of the *Mandel* case, the government satisfied the requirement of a "facially legitimate and bona fide reason." But it is clear that if the government acts for a reason that is not "facially legitimate and bona fide," the challenge must be sustained and the denial of admission must be invalidated. Indeed, judicial decisions calling for application of the "facially legitimate and bona fide reason" standard make up a substantial body of case law that scrutinizes government decisions to deny admission. Judicial review applying this standard is

not a mere rubber stamp. *See Kerry v. Din*, 135 S.Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring) (analyzing "whether the reasons given by the Government satisfy *Mandel*'s 'facially legitimate and bona fide' standard"); *see also Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 125–26 (2d Cir. 2009); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008); *Adams v. Baker*, 909 F.2d 643, 647–50 (1st Cir. 1990). After *Mandel*, a court may find that a denial of admission is invalid because it is not based on a "facially legitimate and bona fide reason." Judicial review is also serious if the requirement of a "facially legitimate and bona fide reason" is taken, as some courts have, to call for rational basis scrutiny. *See, e.g.*, *Johnson v. Whitehead*, 647 F.3d 120, 127 (4th Cir. 2011); *Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995); *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990).

As the present case moves from its current preliminary injunction phase to a resolution on the merits, the decisions of the Ninth and Fourth Circuits suggest a very real possibility that the government's reasons for adopting and implementing sections 2(b), 6(a), and 6(b) of Executive Order 13,780 will fail the "facially legitimate and bona fide reason" test in *Mandel*. The Ninth Circuit found a likelihood that respondents would succeed with their argument that the government has failed to comply with

multiple statutory requirements. *See Hawaii v. Trump*, 859 F.3d 741, 769-82 (9th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017). Courts have identified failure to comply with the governing statute as a basis for finding that a reason for government action is not "facially legitimate." The Fourth Circuit found a likelihood that respondents would succeed with their argument that the pertinent parts of Executive Order 13,780 violate the First Amendment to the U.S. Constitution, in particular because the proffered national security rationale was a pretext and therefore not "bona fide." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 588-601 (4th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017).

This Court's June 26 Order, issued in the preliminary injunction context, reflects a serious effort to balance the equities by preserving the *status quo ante* for persons and entities in the United States that would suffer harm from an unlawful decision to deny admission to a noncitizen. The Order's touchstone—whether "any American party" would suffer "concrete hardship"—unifies all of its examples: the mother-in-law, the university that has accepted a student, the employer who has hired an employee, and the audience that has invited a noncitizen speaker to address it. *See* 137 S. Ct. at 2089. This emphasis on concrete harms and burdens is the only logical way—consistent with the Order's

emphasis on balancing equities and its reliance on *Mandel* as starting points for analysis—to understand what it means for noncitizens to have a "bona fide relationship to a person or entity in the United States" or to be "similarly situated" to the examples in this Court's Order.

A. This Court's precedents affirming the constitutional significance of familial relationships beyond the nuclear family should weigh heavily in the balancing of equities.

In balancing the equities based on concrete harms within the constitutional framework for immigration law in *Mandel*, this Court's precedents affirming the existence of a constitutional interest in familial relationships that extends beyond the nuclear family are highly relevant. The government's narrow interpretation of "close familial relationships" defies the well-established constitutional tradition valuing ties beyond the nuclear family. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court embraced an expansive definition of constitutionally protected family relationships worthy of due process protection. As Justice Powell observed, "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The

tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and deserving of constitutional recognition." *Id.* at 504 (plurality opinion); *see also Troxel v. Granville*, 530 U.S. 57, 64 (2000) (reaffirming the importance of extended family ties, particularly for children whose parents are unable to care for them); *id.* at 98 (Kennedy, J., dissenting) (observing that "[f]or many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood."); *Prince v. Massachusetts*, 321 U.S. 159 (1944) (analyzing the constitutional parental rights of an aunt who was guardian for her nine-year-old niece).

As a result of the government's narrow interpretation of "close familial relationships," citizens and legal residents of the United States may not enjoy the company of their closest relatives at such momentous occasions as their weddings, graduations, the funerals of loved ones, and the births of children. *See, e.g.*, Michael Barbaro, *The Daily: Defining a 'Bona Fide' Family Relationship*, N.Y. Times, June 30, 2017, https://www.nytimes.com/2017/06/30/podcasts/the-daily/the-daily-bona-fide-trump-travel-ban.html (interviewing American woman whose closest relatives, Iranian aunts and uncles, would be unable to travel to the U.S. to attend her wedding should a

travel ban remain in place). The unique and profound impact of close family members' love, consolation, support, and provision of care cannot be achieved without their physical presence in their American relatives' homes and communities. Moreover, although the "technological developments" of today might present greater opportunities for global engagement than in the days *Mandel* was decided—video streaming rather than "telephone hook-ups"—technology still cannot recreate the "particular qualities inherent" in being in the physical presence of family during life's crucial occasions. *See Mandel*, 408 U.S. at 765.

Even in families that have not suffered tragic loss, this Court has noted, close relatives play crucial roles worthy of constitutional protection. *See Moore*, 431 U.S. at 505-06 ("Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship [a grandmother and two cousins] ... cannot be lightly denied by the state"); *Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting) (observing that many children grow up in households without one or both parents, "whether their childhood has been marked by tragedy or filled with considerable happiness and fulfillment"). Intimate bonds with close relatives beyond the nuclear family are particularly indispensable for families touched by violence, severe hardship, or other humanitarian need, as this Court has recognized and as we discuss in greater detail below.

B. In implementing § 6, the government overlooks concrete harms to refugee agencies and family members of refugees in the United States.

In its Motion for Clarification, the government relies almost entirely on its assertion that refugee resettlement agencies do not have bilateral contacts with individual refugees. The government emphasizes that the federal government acts as an intermediary between the refugee and the refugee agency. *See* Motion for Clarification at 23–25. This point is misleading. Since it is much more faithful to the rationale of this Court's June 26 Order to balance equities in light of concrete harms suffered by persons or entities in the United States, it is clear that the United States District Court for the District of Hawaii was correct in considering *all* bona fide relationships that are "formal, documented, and formed in the ordinary course." *See Hawaii v. Trump*, CV. No. 17-00050, 2017 WL 2989048, at *2 (D. Haw. July 6, 2017) (quoting 137 S. Ct. at 2088). This must include the relationships between refugees and the agencies that have devoted considerable resources to the refugees' resettlement. The involvement of the federal government in forming that relationship does not negate its bona fide existence in the ordinary course.

Moreover, the government's interpretation of this Court's June 26 Order interposed an additional arbitrary and improper barrier to entry for refugees with family ties in the United States. With its inappropriately restrictive definition of "close familial relationship," the government refuses to admit individuals who have bona fide relationships with close family members in the United States. If allowed to stand, this would prevent nieces, nephews, and grandchildren who have been extensively vetted through the refugee program from reunifying with family members in the United States. *See, e.g.*, Miriam Jordan, *A Refugee Family Arrives in Arkansas, Before the Door Shuts*, N.Y. Times, July 13, 2017, https://www.nytimes.com/2017/07/13/us/trump-refugee-ban.html (describing situation of nephew barred from joining uncle and aunt who have raised him since infancy). Similar difficulties are noted in several affidavits attached to the Brief of International Refugee Assistance Project and HIAS as *Amici Curiae* in Support of Plaintiffs' Motion to Enforce or, in the Alternative, to Modify Preliminary Injunction, July 10, 2017 (IRAP Brief). *See* IRAP Brief, Exhibit B, Supplemental Declaration of Mark Hetfield, President and CEO of HIAS, Inc. at 2–3 (noting HIAS clients "whose only family members in the United States . . . are respectively: a grandmother; a grandfather; a grandson; an aunt; an

uncle; a cousin; a niece and a nephew; and a sister-in-law"); *id.*, Exhibit C, Declaration of Rebecca Heller, Director of International Refugee Assistance Project, at 7-10 (citing example of Ukrainian refugee whose closest family member in the United States is her grandmother).

Such examples strike at the heart of the Court's opinion in *Moore*, which recognized that families who have suffered loss or hardship are particularly reliant on close relatives beyond the nuclear family. "Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." *Moore*, 431 U.S. at 505. By defining "close familial relationships" to exclude aunts, uncles, cousins, and grandparents, the government's interpretation of the preliminary injunction threatens the very vulnerable individuals and families who face such adversity. If a child does not have parents able to care for her, a grandparent, aunt, or uncle lacking a sibling, child or parent in the United States cannot step in to fill the void. The importance of these ties is reflected in the federal statutes governing state child welfare systems, which require states to exercise due diligence to identify and provide notice of proceedings to a child's adult relatives within 30 days after the child is removed

from parental custody, *see* 42 U.S.C. § 671(a)(29), and in federal immigration regulations, which provide for release of juveniles into the care of adult relatives—including a brother, sister, aunt, uncle or grandparent—when there is no parent or legal guardian available, *see* 8 C.F.R. § 236.3.

II. The government overlooks federal statutory recognition of family relationships that can be the basis of concrete harms from unlawful denials of admission to the United States.

From this perspective, grounded in this Court's application of constitutional immigration law precedents to balance the equities, it becomes clear that the government's analysis of federal immigration statutes is either flawed or irrelevant, or both. In its July 14 Motion for Clarification, the government distinguishes between (a) provisions in the Immigration and Nationality Act that recognize some family relationships as the basis for petitions for immigrant visas, and (b) INA provisions that recognize some family relationships for other immigration law purposes. Motion for Clarification at 27–34. This distinction has no bearing on the

relevant inquiry, which is to balance the equities by asking about persons and entities in the United States that would suffer concrete harm from an unlawful denial of admission. This scope of inquiry, based on the limited but real inquiry required by *Mandel*, explains why this Court's June 26 Order expressly upholds the preliminary injunction to protect noncitizens with a close family relationship—such as a mother-in-law—even if the relationship is not a statutory basis for a direct immigrant visa petition. A mother-in-law would be concretely harmed by an unlawful denial of admission, so this Court's Order categorically includes that situation.

The class of affected Americans who could experience a concrete harm because of the government's overly narrow interpretation of "bona fide relationship" goes well beyond those who might petition for a relative through our admissions system. Americans seek the company, solace, and support of overseas grandparents, aunts and uncles, nieces and nephews, and cousins for many reasons—to mourn the unexpected death of a friend or relative, to celebrate a wedding, or to introduce a new baby born into the family. Reuniting families in these instances would require no green card or even a petition to be filed by an American. A simple tourist visa—sought by the overseas relative, not by the American resident or citizen—is all that would be required to facilitate family reunification.

Even where an immigrant is seeking permanent residence through a family relationship, the INA recognizes that family members beyond those authorized to sponsor the immigrant have an interest in his or her admission. Consider, for example, the "affidavit of support" requirement. Every sponsor who petitions for a noncitizen family member must assume financial responsibility over the immigrant in the form of an affidavit of support. *See* 8 C.F.R. § 213a. If a sponsor dies after a family-based petition has been approved, the INA allows a broad range of relatives to become a "substitute sponsor" for the immigrant, including "a spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, or grandchild." *See* 8 U.S.C. § 1183a(f)(5)(B)(i)–(ii). This provision reflects Congress's understanding that Americans have an interest in the admission for permanent residence of members of their extended families.

CONCLUSION

In sum, the District Court's decision is faithful to this Court's July 26 Order, which properly required a balancing of equities to preserve the *status quo ante* for persons and entities in the United States that would suffer harm if the government's cramped definition of "bona fide relationship" prevails. The

government's position stands in opposition to statutory law and to constitutional precedents weighing heavily in that balance intimate bonds formed with close relatives beyond the nuclear family. The harms the government would inflict on American families and their relatives abroad by narrowly construing "close familial relationships" epitomize the "concrete hardships" this Court rightly sought to avoid in upholding, in substantial part, the district courts' preliminary injunctions.

Respectfully submitted,

MARK A. ARONCHICK
Counsel of Record
ROBERT A. WIYGUL
Hangley Aronchick Segal
Pudlin & Schiller
One Logan Square,
27th Floor
Philadelphia, PA 19103
(215) 568-6200
maronchick@hangley.com

Counsel for Amici Curiae

July 18, 2017

APPENDIX

APPENDIX
AMICI CURIAE LAW PROFESSORS*

Kerry Abrams is Professor of Law at the University of Virginia School of Law, where she is the Co-Director of the Center for Children, Families, and the Law. Professor Abrams teaches courses on immigration law, citizenship law, family law, and the history of marriage law. She has written extensively on immigration and citizenship law in American history. Her articles have appeared in the *Columbia Law Review*, *California Law Review*, *Michigan Law Review*, and *Virginia Law Review*, among others.

Kristin Collins is a Peter Paul Career Development Professor and the Associate Dean for Research & Intellectual Life Boston University School of Law. Professor Collins teaches courses on federal courts, civil procedure, citizenship law, family law, and legal history. She has written extensively on the legal history of the family, and in particular on the history of citizenship transmission. Her articles have appeared in the *Yale Law Journal*, *Duke Law Journal*, the *Vanderbilt Law Review*, *Law and History Review*, among others.

Ann Laquer Estin holds the Aliber Family Chair in Law at the University of Iowa. Professor Estin teaches primarily in the area of family law, with a particular focus on international and comparative

---

* Affiliation of amici curiae are listed for identification purposes only.

family law. She has written extensively in these areas, and is the author of the *International Family Law Desk Book* (2d ed. 2016). Professor Estin is a member of the bar in Colorado and Iowa, and an elected member of the American Law Institute.

Stephen Lee is Professor and Associate Dean for Research and Development at the University of California, Irvine School of Law. He writes and teaches in the areas of immigration law, administrative law, and food law. Professor Lee has received grants from the National Science Foundation and the Russell Sage Foundation and is an elected member of the American Law Institute. His work has appeared or is forthcoming in the *Harvard Law Review*, *Stanford Law Review*, *California Law Review*, and the *University of Chicago Law Review*, among others.

Hiroshi Motomura is the Susan Westerberg Prager Professor of Law at the School of Law, University of California, Los Angeles. He is the author of several pioneering law review articles on constitutional immigration law and two influential books: *Immigration Outside the Law* (2014), and *Americans in Waiting* (2006), and a co-author of two widely used law school casebooks: *Immigration and Citizenship: Process and Policy* (8th ed. 2016), and *Forced Migration: Law and Policy* (2d ed. 2013). He was selected as a Guggenheim Fellow in 2017.

Serena Mayeri is Professor of Law and History at the University of Pennsylvania Law School, where she teaches and writes about family law, antidiscrimination law, and legal history. Her articles on the constitutional treatment of nonmarital

and extended families have recently appeared or are forthcoming in the *California Law Review*, the *Yale Law Journal*, and *Constitutional Commentary*. She is also the author of a prize-winning book, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* (2011).

MOTION FILED
JUL 18 2017

No. 16-1540 (16A1191)

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

STATE OF HAWAI'I, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN OPPOSITION TO PETITIONERS' MOTION AND STAY APPLICATION

PETER KARANJIA
GEOFFREY BROUNELL
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., NW
Suite 800
Washington, D.C. 20006
(202) 973-4256
peterkaranjia@dwt.com

ELIZABETH B. WYDRA
BRIANNE J. GOROD
Counsel of Record
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street, NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae
(Additional Counsel on Inside Cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

VICTOR A. KOVNER
DAVIS WRIGHT
TREMAINE
LLP
1251 Avenue of the Americas,
21st Floor
New York, NY 20020

RAYMOND H. BRESCIA
Professor of Law*
ALBANY LAW SCHOOL
80 New Scotland Ave.
Albany, NY 12208
*For affiliation purposes only

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS

Pursuant to Supreme Court Rule 37.2(b), *amici* respectfully move this Court for leave to file the accompanying brief supporting the State of Hawaii and Dr. Ismail Elshikh. Both parties have consented to the filing of this brief.

Amici Senator Christopher Coons and Representative Zoe Lofgren led the effort that produced an *amici curiae* brief joined by 165 Members of Congress that was filed in support of plaintiffs in the Ninth Circuit in *Hawaii v. Trump*. They are familiar with the Immigration and Nationality Act ("INA") and other laws passed by Congress related to immigration and national security concerns. They are also familiar with the interplay between those laws and constitutional protections for both U.S. citizens and noncitizens.

Amici thus have a strong interest in—and are particularly well-situated to provide the Court with insight into—the proper interpretation of the INA. They are also committed to ensuring that our immigration laws and policies not only help protect the nation from foreign and domestic attacks, but also comport with fundamental constitutional principles and statutory constraints on the authority of the Executive Branch.

Amici therefore seek leave to file the attached brief urging the Court to uphold the district court's decision enjoining the Executive Branch guidance recently issued to implement this Court's order in *Trump v. International Refugee Assistance Project*,

137 S. Ct. 2080 (2017) (per curiam). In their proposed brief, *amici* explain that the Executive Branch has erroneously relied on provisions of the INA—in particular, INA Section 201's definition of "immediate relatives"—that allow a limited set of individuals to sponsor family members for permanent residence in the United States. They also explain that the Administration's guidance unlawfully excludes refugees who have a formal assurance from a refugee resettlement agency, even though such individuals have a "bona fide relationship with . . . [an] entity in the United States," as required by this Court's order.

Respectfully submitted,

PETER KARANJIA
GEOFFREY BROUNELL
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., NW
Suite 800
Washington, D.C. 20006
(202) 973-4256
peterkaranjia@dwt.com

ELIZABETH B. WYDRA
BRIANNE J. GOROD
Counsel of Record
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street, NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Victor A. Kovner
DAVIS WRIGHT
TREMAINE LLP
1251 Avenue of the
Americas, 21st Floor
New York, NY 20020

RAYMOND H. BRESCIA
Professor of Law*
ALBANY LAW SCHOOL
80 New Scotland Ave.
Albany, NY 12208
*For affiliation purposes
only

Counsel for Amici Curiae

July 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

A. The Administration's Guidance on What Familial Relations Are Sufficiently "Close" To Be Covered By the Preliminary Injunctions Is at Odds with this Court's Order. 5

B. The Government Erroneously Relied on the INA's Immigrant Visa Provisions in Interpreting this Court's Order 7

C. The Government's Exclusion from the Preliminary Injunctions of Refugees with a Formal Assurance from a U.S. Resettlement Agency Is Also at Odds with this Court's Order 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Holder v. Martinez Gutierrez,
132 S. Ct. 2011 11

Moore v. City of E. Cleveland,
431 U.S. 494 (1977) 6

Reno v. Flores,
507 U.S. 292 (1993) 7

Saxbe v. Bustos,
419 U.S. 65 (1974) 8

Tooahnippah v. Hickel,
397 U.S. 598 (1970) 6

Trump v. Int'l Refugee Assistance Project,
137 S. Ct. 2080 (2017) (per curiam) ..... *passim*

Statutes

Immigration and Nationality Act

8 U.S.C. § 1101(a)(15)(B) 8, 9

8 U.S.C. § 1151(a) 8

8 U.S.C. § 1151(b)(2)(A)(i) 7, 10

8 U.S.C. § 1153(a) 8, 10

TABLE OF AUTHORITIES – cont'd

Page(s)

8 U.S.C. § 1183a(f)(5)(B)(i) 10

8 U.S.C. § 1184(d)(1) 9

8 U.S.C. § 1433 10

Other Authorities

9 U.S. Dep't of State, Foreign Affairs Manual, available at https://fam.state.gov/FAM/09FAM/09FAM040202.html (last visited July 17, 2017) 8, 9

22 C.F.R. § 41.31 9

Black's Law Dictionary 199 (9th ed. 2009) 5, 12

Executive Order 13,780 .....*passim*

H.R. Rep. No. 82-1365 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653 11

S. Rep. No. 89-748 (1965), 1965 U.S.C.C.A.N. 3328 8

U.S. Citizenship and Immigration Services, Fiancé(e) Visas, https://www.uscis.gov/family/family-us-citizens/fiancee-visa/fiancee-visas (last visited July 17, 2017) 9

INTEREST OF *AMICI CURIAE*[1]

Amici Senator Christopher Coons and Representative Zoe Lofgren led the effort that produced an *amici curiae* brief joined by 165 Members of Congress that was filed in support of plaintiffs in the Ninth Circuit in *Hawaii v. Trump*. They are familiar with the Immigration and Nationality Act ("INA") and other laws passed by Congress related to immigration and national security concerns. They are also familiar with the interplay between those laws and constitutional protections for both U.S. citizens and noncitizens.

Amici thus have a strong interest in—and are particularly well-situated to provide the Court with insight into—the proper interpretation of the INA. They are also committed to ensuring that our immigration laws and policies not only help protect the nation from foreign and domestic attacks, but also comport with fundamental constitutional principles and statutory constraints on the authority of the Executive Branch.

Amici therefore urge the Court to uphold the district court's decision enjoining the Executive Branch guidance recently issued to implement this

---

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. *Amici* have also submitted a motion for leave to file this brief. No party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of any portion of this brief.

Court's order in *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (per curiam). *Amici* submit this brief to explain that the Executive Branch has erroneously relied on provisions of the INA—in particular, INA Section 201's definition of "immediate relatives"—that allow a limited set of individuals to sponsor family members for permanent residence in the United States. *Amici* further submit this brief to explain that the Administration's guidance unlawfully excludes refugees who have a formal assurance from a refugee resettlement agency, even though such individuals have a "bona fide relationship with . . . [an] entity in the United States," as required by this Court's order.

SUMMARY OF ARGUMENT

On March 6, 2017, President Donald Trump signed Executive Order 13,780, which, among other things, suspended entry into the United States of foreign nationals from six Muslim-majority countries. In two separate lawsuits, Respondents obtained preliminary injunctions barring enforcement of a number of the Executive Order's provisions. On June 26, 2017, this Court held that those injunctions should remain in place as to "respondents and those similarly situated." *See IRAP*, 137 S. Ct. at 2087. It granted the Government's request for a stay only "to the extent the injunctions prevent enforcement . . . with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States." *Id.* This Court further explained that, for entry into the United States based on family connections, a "bona fide relationship with a person"

requires "the sort of relationship" enjoyed by Respondents—that is, "a close familial relationship." *Id.* at 2088.

Following issuance of this Court's order, the Administration issued new guidance that interpreted "close familial relationship" based on provisions of the INA that allow a particular set of individuals to sponsor aliens for permanent residence. That interpretation fundamentally misconstrues both the Court's order and the statute. The Administration's new guidance also excluded from the protection of the preliminary injunctions refugees who have a formal assurance from a refugee resettlement agency. That interpretation, too, is at odds with this Court's order. This Court should reject the Government's interpretations and ensure that interim injunctive relief remains available for those with a "credible claim of a bona fide relationship with a person or entity in the United States." *Id.*

First, according to the Administration's guidance, grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States are categorically barred from the injunctions' protection. That interpretation is at odds with this Court's order. Far from requiring ties limited to the traditional "nuclear" family, the Court's order juxtaposes those who possess the requisite relationship against "foreign nationals abroad who have no connection to the United States at all." *Id.* Moreover, this Court's prior decisions in other contexts confirm that "close familial relationships"

are not limited to the bonds between immediate family members. *See infra* at 6-7.

Second, the Administration's reliance on Section 201 of the INA—in particular, that Section's definition of "immediate relatives"—is misplaced. That statute applies in the unique context of the sponsorship of relatives' *permanent relocation* to the United States. By contrast, the provisions of the INA allowing for *temporary* stays do not require that the visa applicant have a particular type of relative in the United States; indeed, they require no relationship with persons in this country at all. But the Administration's interpretation of this Court's order would bar individuals who do not fall within a certain limited list of relationships from even making temporary trips to the United States to visit their relatives.

Third, refugees with a formal assurance from a refugee resettlement agency in the United States have the requisite "bona fide relationship with . . . [an] entity in the United States," as required by this Court's order, *IRAP*, 137 S. Ct. at 2087. Given that refugee resettlement agencies regularly provide formal assurances to refugees—indeed, doing so is central to their work—there can be no question that such relationships are "formed in the ordinary course, rather than for the purpose of evading" the Executive Order. *Id.* at 2088. Moreover, those resettlement agencies would suffer precisely the sort of "concrete hardship," *id.* at 2089, that this Court contemplated if their extensive preparations for hosting a refugee were stymied because the refugee's entry into the country has been blocked.

In sum, the Administration's guidance is at odds with both this Court's order and the INA, and its arbitrary line-drawing should be rejected.

ARGUMENT

A. The Administration's Guidance on What Familial Relations Are Sufficiently "Close" To Be Covered By the Preliminary Injunctions Is at Odds with this Court's Order.

According to the Administration, this Court intended to immediately subject to the Executive Order's prohibitions on entry to the United States anyone who is not "a parent (including parent-in-law), spouse, child, adult son or daughter, son-in-law, daughter-in-law, sibling, whether whole or half," including "step relationships."

In holding that preliminary injunctive relief should remain in place with respect to those who have a "close familial relationship" with a person in the United States, this Court was elaborating on its earlier statement that all persons similarly situated to Respondents—that is, those persons with a "bona fide relationship" with individuals in the United States—should remain protected. A "bona fide" relationship is one "[m]ade in good faith; without fraud or deceit," or a "[si]ncere; genuine" relationship." Black's Law Dictionary 199 (9th ed. 2009). There is no reason to think that grandparents, aunts, uncles, grandchildren, and others whom the Administration now plans to categorically exclude necessarily lack such a "bona fide" relationship. A grandparent seeking to enter

the country is not, critically, "someone who [is] enter[ing] into a relationship simply to avoid" the Executive Order's restrictions. *IRAP*, 137 S. Ct. at 2088.

Moreover, it bears emphasis that this Court contrasted the group of family members who remain protected by the preliminary injunctions—those with "close familial relationships"—not with those who have more distant familial relationships, but with those individuals "who have *no connection to the United States at all.*" *Id.* (emphasis added); *see id.* ("a foreign national who lacks *any connection* to this country"); *id.* ("when there is *no tie* between the foreign national and the United States"); *id.* (foreign nationals who lack "*some connection* to this country"); *id.* ("foreign nationals *unconnected* to the United States") (emphases added). By excluding from interim equitable relief individuals who have "no connection to the United States at all," this Court strongly implied that relatives who *do* have a genuine connection to the United States—as those relatives who are categorically excluded often will—remain protected.

This understanding of what constitutes a "close familial relationship" accords with this Court's decisions in other contexts. For instance, this Court has recognized that an individual suffers a constitutionally cognizable injury if the Government interferes with his relationship with his "uncles, aunts, cousins, and especially grandparents," all of whom it has expressly described as "close relatives." *Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977); *see Tooahnippah v. Hickel*, 397 U.S. 598, 608

(1970) (noting that a testator had a "close and sustained familial relationship with his niece and had resided in her home"); *cf. Reno v. Flores*, 507 U.S. 292, 310 (1993) (in identifying custodians to whom detained juveniles could be released, INS listed not only parents, but also "other close blood relatives, whose protective relationship with children our society has also traditionally respected").

B. The Government Erroneously Relied on the INA's Immigrant Visa Provisions in Interpreting this Court's Order.

Against this backdrop, there is no support for the Administration's assertion that this Court's equitable judgment was guided by any technical definition of "family" imported from the INA—let alone the specific statutory provisions upon which the Administration now relies.

Significantly, the INA does not contain a monolithic concept of "family" that applies across all contexts. To be sure, Section 201, which governs the sponsorship of individuals for permanent relocation to the United States, uses the term "immediate relative" and defines it relatively narrowly to include "the children" (specifically, unmarried children under the age of 21), "spouses, and parents of a citizen of the United States." 8 U.S.C. § 1151(b)(2)(A)(i). Sections 201 and 203 also allow U.S. citizens to sponsor siblings and children (both married and unmarried) who are age 21 or older and lawful permanent residents to sponsor spouses

and unmarried children. *Id.* §§ 1151(a), 1153(a). But those provisions apply only in the specific context of seeking lawful permanent residence in the United States. In other words, they apply specifically to U.S. citizens and lawful permanent residents who apply to gain permanent entry for alien family members.

It is unsurprising that the INA might define family relationships narrowly in this specific context, given all of the consequences that permanent relocation entails, including the Government's potential responsibility to provide care to individuals whose sponsors are unable to provide such support.[2] Other provisions of the INA do not require such a close familial connection. For instance, there are no similar restrictions placed on those visiting their family in the United States on short-term non-immigrant visas (such as "B" visas). *See* 8 U.S.C. § 1101(a)(15)(B).[3] Indeed, neither the INA nor its

---

[2] Permanent resident status allows a noncitizen to "remain in the United States indefinitely," "work in this country," "return . . . after a temporary absence abroad," and "establish[] a permanent residence in the United States." *Saxbe v. Bustos*, 419 U.S. 65, 72 (1974). Given those and other ramifications, Congress took comfort in the fact that "there is a clear responsibility"—including financial-support obligations—"assumed by citizens and lawful alien residents who have filed petitions for their relatives." S. Rep. No. 89-748, at 15 (1965), 1965 U.S.C.C.A.N. 3328, 3334.

[3] The State Department explicitly recognizes that "social visits to relatives or friends" constitute a valid purpose for the issuance of short-term B-2 visas, available to those traveling for pleasure. *See* 9 U.S. Dep't of State, Foreign Affairs Manual § 402.2-4(A), available at https://fam.state.gov/FAM/09FAM/09FAM040202.html (last visited July 17, 2017).

implementing regulations impose any relationship-based restrictions at all on who may obtain a B visa. The only showing applicants must make—aside from clearing applicable security checks—is that they "hav[e] a residence in a foreign country, which they do not intend to abandon"; they "[i]ntend to enter the United States for a period of specifically limited duration"; and they "seek admission for the sole purpose of engaging in legitimate activities relating to business or pleasure." 9 U.S. Dep't of State, Foreign Affairs Manual § 402.2-2(B); *see* 8 U.S.C. § 1101(a)(15)(B); 22 C.F.R. § 41.31.

Yet the Administration overlooks that grandparents and others whom it categorically excludes from the protection of the modified preliminary injunctions are eligible for—and routinely use—B visas.[4] This Court's opinion, moreover, made clear that the preliminary injunctions extend to those with "close familial relationships" who not only wish to "live with," but also to "visit" a family member in the United States. *IRAP*, 137 S. Ct. at 2088. That grandparents and the other excluded family members are free to visit their

---

[4] While the Administration modified its initial guidance to include fiancé(e)s—presumably because that class of relatives is eligible for K-1 non-immigrant visas, *see* 8 U.S.C. § 1184(d)(1); U.S. Citizenship and Immigration Services, Fiancé(e) Visas, https://www.uscis.gov/family/family-us-citizens/fiancee-visa/fiancee-visas (last visited July 17, 2017)—it continues to exclude those relatives who are free to enter the country on B visas.

U.S. relatives on B visas confirms that there is no reason to believe this Court intended to limit its equitable holding to the types of family relationships that can bestow permanent residence. Indeed, the Court's order confirms just the opposite: Mothers-in-law are "clearly" covered by the modified preliminary injunctions, *see IRAP*, 137 S. Ct. at 2088, even though they indisputably qualify as neither "immediate relatives" under INA § 201, nor as family-based immigrants under INA § 203. *See supra* at 7-8 (discussing 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a)).[5]

Significantly, even in the context of sponsorship for permanent residence, the INA does not categorically exclude grandparents under all circumstances. *See* 8 U.S.C. § 1183a(f)(5)(B)(i) (allowing an extended family member to serve as a financial sponsor "for humanitarian reasons," when "the individual petitioning [as the sponsor] died after the approval of such petition"); *see also id.* § 1433 (allowing a grandparent to apply for naturalization on behalf of a child born outside of the United States

---

[5] The Administration contends that "parents-in-law of persons in the United States will typically also be parents of persons in the United States," thus "plac[ing] the parent-in-law relationship in a fundamentally different position from the other relatives" at issue. Mot. for Clarification of June 26, 2017, Stay Ruling at 35-36. There is no merit to the Administration's suggestion that Dr. Elshikh's "mother-in-law" was covered because she is the "mother" of Dr. Elshikh's wife, rather than the "mother-in-law" of Dr. Elshikh. The Court's sole focus was on Dr. Elshikh—not his wife—and it justified the equitable injunctive relief based on "the concrete burdens that would fall on . . . Dr. Elshikh." *IRAP*, 137 S. Ct. at 2087.

if the parent had died during the preceding five years).

The Government's arbitrary line-drawing thus finds no more support in the INA—a statute that implements "the underlying intention of our immigration laws regarding the preservation of the family unit," H.R. Rep. No. 82-1365, at 29 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680; *see Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2019 (goals of "'providing relief to aliens with strong ties to the United States'" and "'promoting family unity'" "underlie or inform many provisions of immigration law")—than it does in this Court's order. It should be rejected.

C. The Government's Exclusion from the Preliminary Injunctions of Refugees with a Formal Assurance from a U.S. Resettlement Agency Is Also at Odds with this Court's Order.

According to the Administration, refugees who have a formal assurance from a refugee resettlement agency in the United States are excluded from the protections of the modified preliminary injunctions. *See* Mot. for Clarification of June 26, 2017, Stay Ruling at 10. This, too, flies in the face of this Court's order.

As the Administration acknowledges, before any refugee travels to the United States under the Refugee Program, the Department of State obtains a commitment (an "assurance") from a resettlement agency. *Id.* at 20. As part of its assurance, the resettlement agency agrees that once the refugee

arrives in the United States, the resettlement agency (or a local affiliate) will provide certain government-funded benefits for that refugee. *Id.* at 20-21. The Administration also acknowledges that "[t]he services provided by resettlement agencies and their local affiliates throughout the country include placement, planning, reception, and basic needs and core service activities for arriving refugees." *Id.* at 21.

The relationship thus formed between a refugee and a resettlement agency is surely "bona fide"—that is, "[m]ade in good faith," Black's Law Dictionary, *supra*, at 199. It is "formal, documented, and formed in the ordinary course, rather than for the purpose of evading" the Executive Order. *IRAP*, 137 S. Ct. at 2088. Moreover, as this Court explained, when such a bona fide relationship exists "with a particular person seeking to enter the country as a refugee," the "American individual or entity that has" this relationship "can legitimately claim concrete hardship if that person is excluded." *Id.* at 2089. A hosting resettlement agency suffers such "concrete hardship" when its extensive preparations are stymied because the refugee's entry into the United States has been blocked. The modified preliminary injunctions therefore protect refugees who have assurances from resettlement agencies in the United States.

The Administration nevertheless argues that "[p]rior to the refugee's arrival, . . . the relationship is solely between the government and the agency, not between the agency and the refugee." Mot. for Clarification of June 26, 2017, Stay Ruling at 2.

Whatever the amount of direct contact between the refugee and the resettlement agency prior to a refugee's admission, however, there is no question that the agency's assurance creates a "bona fide relationship" between the two. This is no different than if an American company made a worker an offer of employment through an employment agency or other intermediary. The Court should reject the Government's formalism and its effort to circumvent the protections of this Court's order.

CONCLUSION

For the foregoing reasons, this Court should uphold the district court's decision to enjoin the Administration's guidance, deny the application for a stay of that decision, and reject the Administration's requested "clarification" of this Court's order.

Respectfully submitted,

PETER KARANJIA
GEOFFREY BROUNELL
DAVIS WRIGHT
TREMAINE LLP
1919 Pennsylvania Ave.,
NW, Suite 800
Washington, D.C. 20006
(202) 973-4256
peterkaranjia@dwt.com

ELIZABETH B. WYDRA
BRIANNE J. GOROD
Counsel of Record
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY
CENTER
1200 18th Street, NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Victor A. Kovner
DAVIS WRIGHT
TREMAINE LLP
1251 Avenue of the
Americas, 21st Floor
New York, NY 20020

RAYMOND H. BRESCIA
Professor of Law*
ALBANY LAW SCHOOL
80 New Scotland Ave.
Albany, NY 12208
*For affiliation purposes only[6]

Counsel for Amici Curiae

July 2017

---

[6] Counsel for *amici* are grateful for the valuable contributions to this brief of Davis Wright Tremaine summer associate Katherine K. Moy, and Professor Brescia's students (Andrew Carpenter, Elyssa Klein, Mary Ann Krisa, Graham Molho, and Gloria Sprague).

RECORD AND BRIEFS

MOTION FILED

JUL 18 2017

No. 16-1540 (16A1191)

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

STATE OF HAWAI'I, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN OPPOSITION TO PETITIONERS' STAY APPLICATION

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ANISHA S. DASGUPTA
Deputy Solicitor General
ZAINAB A. CHAUDHRY
Assistant Solicitor General
120 Broadway
New York, NY 10271
(212) 416-8020
barbara.underwood@ag.ny.gov
**Counsel of Record*

(Additional Counsel Listed on Signature Pages)

MOTION FOR LEAVE TO FILE

The States of New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia move this Court for leave to file the enclosed brief as amicus curiae in opposition to defendants' stay application,[1] without 10 days' advance notice to the parties of amici's intent to file as ordinarily required by Supreme Court Rule 37.2(a). In light of the extremely expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice. All parties have consented in writing to the filing of the brief without such notice.

On June 26, 2017, this Court granted certiorari in this case and another case addressing the legality of certain provisions of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017), and partly granted the federal government's request for a stay of the nationwide preliminary injunctions entered in these cases. The Court left in place that part of the injunctions that restrained enforcement of the Order's temporary ban on the entry to the United States of nationals from six majority Muslim countries, or any refugees, where the foreign national seeking admission has a "bona fide relationship with a person

---

[1] The defendants in this action are: Donald J. Trump, as President of the United States; the United States Department of Homeland Security; John F. Kelly, as Secretary of Homeland Security; the United States Department of State; Rex Tillerson, as the Secretary of State; and the United States. This motion refers to them collectively as "defendants" or "the federal government."

or entity in the United States." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017). The Court explained that such a relationship can be either "a close familial relationship" with "a person" in the United States, or a "formal, documented" relationship with an entity or organization that was "formed in the ordinary course." *Id.*

Thereafter, the federal government issued guidance narrowly defining the qualifying family relationships. Plaintiffs then challenged that guidance, moving the district court for—among other things—enforcement of the remaining portion of its preliminary injunction, pending this Court's review of the merits in October 2017. On July 13, 2017, the district court held that the federal government's restrictive definition conflicted with this Court's decision of June 26 and partly granted plaintiffs' motion. Defendants now move in this Court for clarification of this Court's June 26 ruling and a stay of the district court's July 13 order pending judicial review.

As set forth in the enclosed brief, the undersigned amici States and our residents will suffer irreparable harms if the July 13 order enforcing the injunction is stayed. The interest of the amici States arises from the fact that many provisions of the Executive Order have threatened and already caused substantial harm to our States, hospitals, universities, businesses, communities, and residents as litigation over the Order's legality continues. While this Court's June 26 decision to leave important aspects of the injunction in place provides critical protection to the state interests endangered by the Order, the amici States have a strong continuing interest in ensuring that this

protection is not diminished by the federal government's restrictive interpretation of the June 26 ruling, which is inconsistent with the ruling's meaning and purpose.

Consequently, the amici States have a distinct perspective on the harms threatened by a stay of the July 13 injunction, and the justifications for preserving the status quo while any judicial review of that order proceeds, that may be of considerable assistance to the Court. We have asserted and documented these harms in briefs in this Court opposing a stay of the initial preliminary injunction,[2] as well as in numerous other cases challenging this Executive Order[3] and its predecessor.[4] Pursuant to Supreme Court Rule 37.1, the undersigned amici States therefore seek to file this brief in order to demonstrate that granting a stay of the July 13 injunction as requested by defendants will result in irreparable harm to our States and residents.

---

[2] Va. Amicus Br. (16 States and D.C.), *Trump v. IRAP*, Nos. 16A1190, 16A1191 (Sup. Ct. June 21, 2017).

[3] *See* Second Am. Compl., *Washington v. Trump*, No. 17-cv-00141-JLR (W.D. Wash. Mar. 16, 2017) (challenge by Washington, California, Oregon, New York, Maryland, and Massachusetts, stayed pending appeal in *Hawaii v. Trump*), ECF No. 152; Ill. Amicus Br. (16 States and D.C.), *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Va. & Md. Amicus Br. (16 States and D.C.), *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 153.

[4] *See Washington v. Trump*, 17-cv-00141, 2017 WL 462040, at *2-*3 (W.D. Wash. Feb. 3, 2017) (enjoining travel and refugee bans), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017); Mass. & N.Y. Amicus Br. (15 States and D.C.), *Washington v. Trump*, No. 17-141 (9th Cir. 2017), ECF No. 58-2; *Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855, at *11 (E.D. Va. Feb. 13, 2017) (enjoining travel ban as applied to Virginia).

CONCLUSION

The Court should grant amici curiae leave to file the enclosed brief in opposition to defendants' stay application.

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ANISHA DASGUPTA
Deputy Solicitor General
ZAINAB A. CHAUDHRY
Assistant Solicitor General
barbara.underwood@ag.ny.gov

July 2017

* *Counsel of Record*

(*Counsel listing continues on next page*)

XAVIER BECERRA
Attorney General
State of California
1300 I Street
Sacramento, CA 95814

JANET T. MILLS
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

GEORGE JEPSEN
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MATTHEW P. DENN
Attorney General
State of Delaware
Carvel State Bldg., 6th Fl.
820 N. French Street
Wilmington, DE 19801

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

LISA MADIGAN
Attorney General
State of Illinois
100 W. Randolph Street,
12th Fl.
Chicago, IL 60601

HECTOR BALDERAS
Attorney General
State of New Mexico
408 Galisteo Street
Santa Fe, NM 87501

THOMAS J. MILLER
Attorney General
State of Iowa
1305 E. Walnut Street
Des Moines, IA 50319

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street, N.E.
Salem, OR 97301

PETER F. KILMARTIN
Attorney General
State of Rhode Island
150 S. Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 North Ninth Street
Richmond, VA 23219

BOB FERGUSON
Attorney General
State of Washington
800 Fifth Avenue, Ste. 2000
Seattle, WA 98104

KARL A. RACINE
Attorney General
District of Columbia
One Judiciary Square
441 4th Street, N.W.
Washington, DC 20001

TABLE OF CONTENTS

Page

INTRODUCTION AND INTERESTS OF THE AMICI STATES 1

ARGUMENT 7

I. The Federal Government Has Not Met Its Burden of Establishing a Strong Likelihood of Success on the Merits. 8

II. The Balance of the Equities Strongly Favors Denial of a Stay. 17

CONCLUSION 21

TABLE OF AUTHORITIES

Cases **Page(s)**

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) 18

Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) 9,12,18

Nken v. Holder, 556 U.S. 418 (2009) 7,17

Overton v. Bazzetta, 539 U.S. 126 (2003) 18

Reno v. Flores, 507 U.S. 292 (1993) 9-10

Troxel v. Granville, 530 U.S. 57 (2000) 9

Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) ..... passim

Laws

Immigration and Nationality Act, 8 U.S.C.
§ 1101 et seq. 13
§ 1101 13
§ 1151 13,14
§ 1153 13,14
§ 1183a 13
§ 1433 13

8 C.F.R. § 214.11(a)(3) 13

Executive Order No. 13,780 (Mar. 6, 2017), 82 Fed. Reg. 13,209 (Mar. 9, 2017) ..... passim

Miscellaneous Authorities **Page(s)**

Chapin Hall, Univ. of Chi., *What Are Important Differences Among Kinship Foster Families* (2016), *at* http://www.chapinhall.org/research/inside/what-are-important-differences-among-kinship-foster-families 12

Gerstel, Naomi, *Rethinking Families and Community: The Color, Class, and Centrality of Extended Kin Ties*, 26 Sociological F. 1 (2011) 12,19

Merriam-Webster Dictionary, https://www.merriam-webster.com/ 6, 16

Native American Training Inst., *Kinship Relationships and Expectations, at* http://tinyurl.com/NativeAmTrainingInst 11

Oxford Dictionaries, https://en.oxforddictionaries.com/..... 6, 16

Pashos, Alexander, *Asymmetric Caregiving by Grandparents, Aunts, and Uncles and the Theories of Kin Selection and Paternity Certainty: How Does Evolution Explain Human Behavior Toward Close Relatives?*, 51 Cross-Cultural Res. 263 (2017)..... 12

Slade, Margaret, *Relationships: The Role of Uncles and Aunts*, N.Y. Times, Apr. 9, 1984, *at* http://tinyurl.com/Slade-NYTimes 11

Smithgall, Cheryl, et al., *Caring for their Children's Children* 1 (Chapin Hall Ctr. for Children, Univ. of Chicago 2006), *at* https://chapinhall.org/sites/default/files/old_reports/305.pdf..... 11

Page(s)

Stack, Carol, *All Our Kin: Strategies for Survival in a Black Community* (1974)..... 12

Wiltz, Teresa, *Why More Grandparents Are Raising Children* (The Pew Charitable Trusts Nov. 2, 2016), *at* http://tinyurl.com/WiltzPewCharitableTrusts 11

Xie, Xiaolin, & Yan Xia, *Grandparenting in Chinese Immigrant Families*, 47 Marriage & Family Rev. 383 (2011), *at* http://tinyurl.com/XiaXieMarriageFamilyRev 11

INTRODUCTION AND INTERESTS OF THE AMICI STATES

On June 26, 2017, this Court granted certiorari in this case and a companion case addressing the legality of certain provisions of Executive Order No. 13,780, which imposed a 90-day ban on the entry to the United States of nationals from six overwhelmingly Muslim countries, suspended the U.S. Refugee Admissions Program, and lowered the Program's refugee cap.[1] *Trump v. Int'l Refugee Assistance Project (IRAP)*, 137 S. Ct. 2080 (2017). The Court partly stayed the district court's injunction against those provisions but expressly left the injunction in place with respect to foreign nationals who have a "bona fide relationship with a person or entity in the United States." *Id.* at 2088. The Court explained that such a relationship can be either "a close familial relationship" with "a person" in the United States, or a "formal, documented" relationship with an entity or organization that was "formed in the ordinary course." *Id.*

Notwithstanding that ruling, defendants[2] have issued guidance stating that the federal government intends to enforce the enjoined provisions of the Executive Order against certain close family members of persons in the United States—including grandparents, grandchildren, aunts, uncles, nieces, nephews,

---

[1] Executive Order No. 13,780, §§ 2(c), 6(a)-(b) (Mar. 6, 2017), 82 Fed. Reg. 13,209 (Mar. 9, 2017).

[2] The defendants in this action are: Donald J. Trump, as President of the United States; the United States Department of Homeland Security; John F. Kelly, as Secretary of Homeland Security; the United States Department of State; Rex Tillerson, as the Secretary of State; and the United States. This brief refers to them collectively as "defendants" or "the federal government."

and cousins (D. Ct. ECF No. 294-1, at 4 ¶ 11). That exclusion conflicts with the language and rationale of this Court's order preserving the injunction with respect to foreign nationals who have a "bona fide relationship with a person or entity in the United States," as well as the meaning and purpose of the underlying injunction as modified by this Court's partial stay.

Plaintiffs the State of Hawaii and Ismail Elshikh challenged the federal government's guidance. The district court denied plaintiffs' motion to clarify the scope of the remaining injunction,[3] but on July 13, 2017, partly granted plaintiffs' subsequent motion to interpret and enforce the injunction (D. Ct. ECF No. 345, attached as Addendum ("Add.") to Defendants' Motion for Clarification and a Stay of Modified Injunction ("Mot.")). With respect to the standard for determining close familial relationships, the district court held that the federal government's narrow definition conflicts with this Court's June 26 decision, and that plaintiffs' requested injunctive relief was "necessary to preserve the status quo" pending this Court's hearing of the case in October 2017 (Add. 14-15). Defendants filed a notice of appeal in the Ninth Circuit Court of Appeals (D. Ct. ECF No. 346, docketed as 9th Cir. No. 17-16426, July 14, 2017). Defendants also now move this Court for "clarification of [its] June 26, 2017 stay ruling" and a stay of the injunction set forth in the district court's order of July 13 (i) pending this Court's determination of the motion for clarification, or alternatively (ii) pending disposition of any

---

[3] D. Ct. ECF No. 322, at *Hawaii v. Trump*, No. 17-cv-50, 2017 WL 2882696 (D. Haw. July 6, 2017), *appeal dismissed*, *Hawaii v. Trump*, No. 17-16366 (9th Cir. July 7, 2017), ECF No. 3.

appeal in the court of appeals, if this Court directs defendants to pursue that review in the first instance.

Amici States New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia submit this brief as amici curiae in opposition to defendants' stay application.[4] This brief supplements plaintiffs' brief by providing the perspective and experience of 15 additional sovereign States and the District of Columbia, all of which have an urgent interest in the outcome of the stay application and preservation of the status quo under the circumstances, given the irreparable harms that will result to the amici States and our residents if a stay of the July 13 injunction is granted.

Like plaintiffs here, the amici States have brought suits challenging the Executive Order and its predecessor on the grounds that certain provisions of those Orders violate the Establishment Clause of the United States Constitution and various other constitutional and statutory provisions.[5] We have also

---

[4] The parties have consented to the filing of this brief. Because this Court's expedited briefing schedule did not permit earlier notice, the parties were notified on July 15, 2017. As this date was less than ten days before filing, amici States are concurrently filing a motion requesting leave to file this brief.

[5] Cases challenging this Executive Order: *See* Second Am. Compl., *Washington v. Trump*, No. 17-cv-141 (W.D. Wash. Mar. 16, 2017) (challenge by Washington, California, Oregon, New York, Maryland, and Massachusetts, stayed pending appeal in *Hawaii v. Trump*), ECF No. 152.

Cases challenging predecessor Order: *See Washington v. Trump*, No. 17-cv-141, 2017 WL 462040, at *2-*3 (W.D. Wash.

previously filed briefs amicus curiae in this case, including briefs supporting the entry of a preliminary injunction against the Executive Order, and briefs opposing any stay of such a preliminary injunction.[6] In particular, following this Court's June 26 decision, the amici States filed briefs supporting plaintiffs' motion to interpret and enforce the injunction[7]—which is the subject of defendants' present application for relief.

Amici have a strong interest in plaintiffs' challenge to this Executive Order because many of its provisions have threatened—indeed, have already caused—substantial harm to our residents, communities, hospitals, universities, and businesses while courts continue to adjudicate the Order's lawfulness. The nationwide preliminary injunction initially entered by the district court in this case, along with the nationwide injunction entered in *Trump v. IRAP*, substantially mitigated the harm threatened by the Order. And this Court's decision to leave important aspects of those injunctions in place continues to provide critical protection to the state interests

---

Feb. 3, 2017) (enjoining travel and refugee bans), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017); Mass. & N.Y. Amicus Br. (15 States and D.C.), *Washington v. Trump*, No. 17-141 (9th Cir. 2017), ECF No. 58-2; *Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855, at *11 (E.D. Va. Feb. 13, 2017) (enjoining travel ban as applied to Virginia).

[6] Va. Amicus Br. (16 States and D.C.), *Trump v. IRAP*, Nos. 16A1190, 16A1191 (Sup. Ct. June 21, 2017); N.Y. Amicus Br. (16 States and D.C.), *Trump v. IRAP*, Nos. 16A1190, 16A1191 (Sup. Ct. June 21, 2017); Ill. Amicus Br. (16 States and D.C.), *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Va. & Md. Amicus Br. (16 States and D.C.), *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 153.

[7] D. Ct. ECF Nos. 331, 333.

endangered by the Order. Accordingly, the amici States have a strong interest in ensuring that the protection provided by the remaining portions of the injunction is not diminished by an interpretation that is inconsistent with the meaning and purpose of this Court's directives.

The amici States are particularly concerned that the federal government has construed this Court's phrase "bona fide relationship with a person or entity in the United States" in a manner so narrow that it will not adequately protect the ability of state universities, hospitals, and businesses to recruit and retain students and staff from the affected countries, or otherwise protect the rights of persons in the United States. When foreign nationals decide whether to accept offers of employment or offers of admission to an educational institution in the United States, they take into account whether their close family members will be able to visit them. And during the time that such persons are actually working or studying in the United States, their fundamental familial relationships are profoundly burdened if close family members are prevented from visiting them. The artificially narrow line drawn by the federal government will thus likely impair the ability of institutions in the amici States to recruit and retain individuals from the affected countries who do not wish to endure the hardship of enforced separation from family members with whom they have bona fide "close familial relationship[s]."[8] *Trump v. IRAP*, 137 S. Ct. at 2088.

---

[8] Amici States also share the concerns raised by plaintiffs about other aspects of the federal government's guidance, *see* Brief for Hawai'i at 10-15, D. Ct. ECF No. 328-1. And amici States

Nothing in the text or rationale of the Court's order supports the federal government's decision to exclude grandparents, grandchildren, aunts, uncles, nieces, nephews, and cousins (including first cousins), from the list of "close familial relationship[s]" that qualify for the protection of the unstayed portion of the preliminary injunction as a "bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 137 S. Ct. at 2088. Defendants are simply mistaken in suggesting that the district court, by protecting those relationships, has "eliminate[d]" the distinction between "family member" and "close family member" (Mot. at 4, 15, 25-26). The district court was acutely aware that this Court's order required drawing a line between "close familial relationship[s]" and other family relationships (*see, e.g.*, Add. 11-12). Defendants perhaps assume that the district court used the term "cousin" to encompass a wide range of family relationships, but that is not a sensible interpretation of the district court's order. The common and primary definition of "cousin" is "a child of one's uncle or aunt,"[9] and that is the definition that most reasonably fits the purpose of the district court's order, namely, to identify the close familial relationships contemplated by this Court's June 26 decision.

---

agree with plaintiffs that there is no basis for this Court to stay the district court's measured approach to the refugee aspects of the injunction. These issues are addressed in detail by plaintiffs and other amici.

[9] *See Oxford Dictionaries*, s.v. cousin (internet); *Merriam-Webster Dictionary*, s.v. cousin (internet). The terms "uncle" and "aunt" are commonly defined to mean a parent's sibling or the spouse of such a sibling. *See Oxford Dictionaries*, s.v. uncle; *Merriam-Webster Dictionary*, s.v. uncle; *Oxford Dictionaries*, s.v. aunt; *Merriam-Webster Dictionary*, s.v. aunt.

Giving effect to the federal government's arbitrarily narrow list of close familial relationships that qualify for the protection of the preliminary injunction will result in the improper exclusion of numerous foreign nationals who have the requisite bona fide connection to a person in the United States, despite this Court's unequivocal holding that the protections for such persons remain in full force.

ARGUMENT

In considering an application for a stay pending judicial review, the Court considers whether (1) the stay applicant has "made a strong showing" of the likelihood of success on the merits; (2) the applicant "will be irreparably harmed absent a stay;" (3) a stay "will substantially injure the other parties interested in the proceeding"; and, finally, (4) "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). The likelihood of success on the merits is one of the "most critical" factors, *id.*, and the remaining factors require the Court to "balance the equities" when it explores the relative harms as well as the public interest, *Trump v. IRAP*, 137 S. Ct. at 2087 (quoting *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers)). Importantly, a stay "is not a matter of right" and the "party requesting the stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken*, 556 U.S. at 433-34. Defendants have made no such showing here. Thus, a stay is not warranted, as explained below.

I. The Federal Government Has Not Met Its Burden of Establishing a Strong Likelihood of Success on the Merits.

In partially granting plaintiffs' motion to interpret and enforce the portion of the preliminary injunction left in place by this Court's June 26 decision, the district court held that the federal government was interpreting the Court's "close familial relationship" standard in an unduly restrictive manner (Add. 11-15). The federal government has stated that it intends to recognize as bona fide "close familial relationship[s]" protected by the injunction only a specified list of family relationships that do not include grandparents, grandchildren, aunts, uncles, nieces, nephews, and cousins (including first cousins). But nothing in the language or rationale of this Court's prior order supports such a restrictive definition of "close familial relationship." Indeed, the federal government's narrow interpretation improperly excludes persons who fall squarely within the meaning and purpose of the injunction as described by this Court.

First, as the district court correctly observed (Add. 12), the federal government's interpretation is not supported by the "careful language" used by this Court in its June 26 decision. This Court, while staying the underlying injunction in part, broadly held that §§ 2(c), 6(a), and 6(b) of the Executive Order "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 137 S. Ct. at 2088. The Court made clear that the exclusionary provisions of these sections can be enforced only against those "who have no connection" or "no tie" to the United States. *Id.*

With respect to foreign nationals claiming a bona fide relationship with *a person* in the United States, this Court held that "a close familial relationship is required," but did not expressly limit what constitutes such a relationship or enumerate an exhaustive list of relationship categories, *id.*, as the district court recognized (Add. 12). Instead, this Court provided two examples of the "sort of relationship" that continues to be protected under the injunction—being a wife or a mother-in-law of a person in the United States. 137 S. Ct. at 2088. The Court's recognition that a person's relationship to his or her mother-in-law "clearly" presents a close enough relationship to qualify for protection, *id.*, implies that the Court viewed the injunction as encompassing a broader category of close familial relationships than those found within a traditional nuclear family.

Indeed, this Court has long recognized in various contexts that relatives other than nuclear family members may constitute close family relations for various purposes, and that this country's "deeply rooted" history and tradition "support[] a larger conception of the family." *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502-05 (1977). In *Moore*, for example, the Court invalidated an ordinance prohibiting a grandmother from living with her grandchild, noting that the "tradition of uncles, aunts, cousins, and especially grandparents sharing a household with parents and children" has "venerable" roots. *Id.*; *see also Troxel v. Granville*, 530 U.S. 57, 64 (2000) (recognizing in grandparent visitation case the "changing realities of the American family" where "grandparents and other relatives undertake duties of a parental nature in many households"). And in *Reno v. Flores*, the Court held that the Immigration and

Naturalization Service had rationally decided to treat aunts, uncles, and grandparents as "close blood relatives" who were presumptively appropriate custodians for detained alien juveniles, recognizing that "society has . . . traditionally respected" those relatives' "protective relationship with children." 507 U.S. 292, 297, 310 (1993).

The federal government, however, has sought to narrowly define "close family" as only "a parent (including parent-in-law), spouse, child, adult son or daughter, son-in-law, daughter-in-law, sibling, whether whole or half," including "step relationships." (D. Ct. ECF No. 294-1, at 4, ¶ 11.) That definition expressly excludes "grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law." (*Id.*; *see also* D. Ct. ECF No. 294-2; D. Ct. ECF No. 264-3, at 2-3.)

Contrary to defendants' assertion (Mot. at 26-27), nothing in this Court's June 26 order links the scope of the remaining injunction to the scope of the Executive Order's waiver provision for foreign nationals who wish to visit or reside with a "close family member," which the Executive Order defines as either "a spouse, child, or parent." Order § 3(c)(iv). Indeed, the Court expressly stated that plaintiff Dr. Elshikh's relationship with his mother-in-law qualified her for protection under the remaining injunction, 137 S. Ct. at 2088, although a mother-in-law is not defined as a "close family member" under the Order's waiver provisions. Order § 3(c)(iv). To be sure, Dr. Elshikh's mother-in-law is also the mother of his wife (*see* Mot. at 34-36), but the Court did not rely on that fact in its July 26 decision. *See Trump v. IRAP*, 137 S. Ct. at 2088.

The federal government's cramped view of what counts as a "close familial relationship" is also contradicted by both common experience and decades of social science research. In particular, the relationship between grandparents and grandchildren is widely recognized as close to—and sometimes a substitute for—the relationship between parents and children.[10] Other excluded family relationships, including those with uncles and aunts—and likewise with cousins who are the children of those uncles and aunts—can also be close and significant.[11] Since at

---

[10] Indeed, grandparents are frequently responsible for caring for and nurturing their grandchildren. *See, e.g.*, Teresa Wiltz, *Why More Grandparents Are Raising Children* (The Pew Charitable Trusts Nov. 2, 2016) (internet) (stating that in 2015, approximately 2.9 million children in this country were living with grandparents who were responsible for their care and discussing reasons for this increase); Cheryl Smithgall, et al., *Caring for their Children's Children* 1, 4 (Chapin Hall Ctr. for Children, Univ. of Chicago 2006) (internet) (in 2000-2001 there were over 100,000 households in Illinois in which a grandparent had primary caregiving responsibility for grandchildren living in the home); Xiaolin Xie & Yan Xia, *Grandparenting in Chinese Immigrant Families*, 47 Marriage & Family Rev. 383 (2011) (internet) (studying cultural trend in Chinese immigrant families of bringing grandparents to United States, often on temporary visas only, to be primary care givers for grandchildren while parents worked outside the home). (For authorities available on the internet, full URLs are listed in the table of authorities.)

[11] *See, e.g.*, Native American Training Inst., *Kinship Relationships and Expectations* (internet) (describing relationship between an aunt and niece as akin to that of a mother and child; relationship between an uncle and nephew as "similar to the relationship between a young boy and his father"; and that a brother-in-law may appropriately "help a brother raise male children"); Margaret Slade, *Relationships: The Role of Uncles and Aunts*, N.Y. Times, Apr. 9, 1984 (internet) ("Among some ethnic

least the early 1970s, social scientists have rejected the notion that the nuclear family is a historical or universal norm, recognizing that these and other close family relationships often provide critical caregiving and resources, particularly for families in economic and social distress.[12] As this Court has noted, "[e]specially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." *Moore*, 431 U.S. at 505; *see also id.* at 506-13 (Brennan, J., concurring) (observing that early American immigrants relied on extended family for "social

---

groups, aunts and uncles serve as a network that can absorb children from another household when needed, as in a divorce or after a parent's death"); Alexander Pashos, *Asymmetric Caregiving by Grandparents, Aunts, and Uncles and the Theories of Kin Selection and Paternity Certainty: How Does Evolution Explain Human Behavior Toward Close Relatives?*, 51 Cross-Cultural Res. 263, 272 (2017) (in addition to discussing grandparent, aunt, and uncle caregiving patterns, noting one study finding kinship caregiving and "closeness toward first cousins"); *id.* at 272-275 (also discussing recent studies finding "more cultural variety in kin caregiving patterns than often previously assumed"); *see also* Chapin Hall, Univ. of Chi., *What Are Important Differences Among Kinship Foster Families* (2016) (internet) (noting in recent study of Illinois kinship foster families that over 43% of those families "were almost exclusively headed" by relatives such as aunts, uncles, and cousins).

[12] Pashos, *Asymmetric Caregiving*, *supra*, 51 Cross-Cultural Res. at 264-278; Naomi Gerstel, *Rethinking Families and Community: The Color, Class, and Centrality of Extended Kin Ties*, 26 Sociological F. 1, 2-10, 17 (2011); *see also* Carol Stack, *All Our Kin: Strategies for Survival in a Black Community* (1974) (foundational work illustrating the significance of extended family networks on the social and economic survival of disadvantaged Black American families).

services and economic and emotional support in times of hardship" and that this remains a "means of survival" for the poor and underprivileged). There is thus simply no justifiable basis for categorically excluding these significant and often essential relationships from the class of close family relationships that qualify for protection under the modified injunction.

Defendants are wrong in suggesting (Mot. at 27-31) that the scope of the remaining injunction should be dictated by the categories of relationship that are eligible for family-based long-term immigrant visas under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq. As the district court correctly observed (Add. 13), other INA provisions treat relatives such as grandparents, nieces and nephews, and siblings-in-law as close family members (Mot. at 31-33).[13] Moreover, the definitions applicable to family-based immigrant visas in 8 U.S.C. §§ 1101(b)(1)-(2), 1151(a)(1) & (b)(2), 1153(a) serve a different and distinguishable purpose from the preliminary injunction at issue here. The definitions in these provisions reflect a Congressional policy determination about how far to extend the opportunity

---

[13] *See, e.g.*, 8 U.S.C. §1183a(f)(5) (sisters-in-law, brothers-in-law, grandparents, and grandchildren may serve as financial sponsors for certain aliens when petitioning family member dies); *id.* § 1101(a)(15)(T)(ii)(III) and 8 C.F.R. § 214.11(a)(3) (grandchildren, nieces, and nephews of a person may be eligible for special visas for victims of human trafficking if they face danger of retaliation based on that person's escape from trafficking or cooperation with law enforcement); 8 U.S.C. § 1433(a) (permitting application for naturalization on behalf of a grandchild under limited circumstances, such as death of an American citizen parent).

for permanent immigration with a path to American citizenship. In contrast, the injunction at issue here provides interim protection to applicants for shorter-term non-immigrant visas on the understanding that persons in the United States should not be prevented from seeing close family members while courts adjudicate the legality of the disputed provisions of the Executive Order. The error in the federal government's approach is evident in the fact that, although the INA's definition of "family" excludes mothers-in-law, *see, e.g.*, *id.* §§ 1151(b)(2)(A), 1153(a), this Court expressly held that this relationship is within the ambit of the injunction's protections. *Trump v. IRAP*, 137 S. Ct. at 2088.

Second, the federal government's interpretation of the injunction is inconsistent with the rationale this Court gave for distinguishing between foreign nationals who have a bona fide "connection" or "tie" to someone in the United States and those who lack such a relationship. As the Court reasoned, denying entry to a foreign national with no close ties to the United States "does not burden any American party by reason of that party's relationship with the foreign national," whereas the exclusion of a close family member of a person in the United States results in an "obvious hardship" to that person.[14] *Trump v. IRAP*, 137 S. Ct.

---

[14] This Court's use of the term "*a person* . . . in the United States," 137 S. Ct. at 2088 (emphasis added), to serve as the reference point for evaluating the relevant hardship further demonstrates that the Court did not intend the scope of the injunction at issue here to be governed by the sections of the INA, which authorize only citizens and legal permanent residents—and not all persons in the United States—to sponsor family members for permanent immigration. *See* 8 U.S.C. §§ 1151(a)-(b), 1153(a).

at 2088. The Court applied the same analysis to the suspension of refugee admissions under §§ 6(a) and (b) of the Executive Order, and emphasized that it was "not disturb[ing] the injunction" where "[a]n American individual . . . that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded." *Id.* at 2089. The district court here correctly recognized (Add. 12) that these essential underlying considerations should serve to guide its evaluation of the issue.

Finally, in arguing that the district court's interpretation of the reach of "close familial relationship[s]" is too sweeping and includes "virtually all family members" (Mot. at 3-4, 14-15, 26), defendants fundamentally misunderstand the relationships covered by the injunction. For example, defendants presume (Mot. at 15) that the terms "uncle" and "cousin" reflect "distant" family relationships. But as explained above (at 9-13), this Court has long respected and confirmed the status of uncles, aunts, and cousins as close blood relatives, and such relationships have also been widely recognized as close and significant in the social science literature generally.

Indeed, when parents die or are unavailable to care for a child, aunts and uncles may often become the primary caregivers for their nieces or nephews, who are then like one of the aunt's or uncle's own children. In support of their motion below, plaintiffs provided a compelling illustration of exactly this circumstance: after both biological parents of John, a young Congolese man, died of cholera when he was one month old, he went to live with his paternal uncle, who raised him as a son alongside the uncle's ten biological

children. John's uncle never legally adopted John, however, because that practice was not part of their culture and there was no need to do so; the uncle already considered John a son and John's cousins considered him a brother. After fleeing for their lives as refugees in 2009, the family was finally resettled in the United States on July 4th of this year—but without John, who was forced to stay behind (presumably under application of the federal government's guidance to him), and who is now separated from the only "parents" and "siblings" he has ever known—a frightening and emotionally devastating experience for both John and his United States–based family. (D. Ct. ECF Nos. 343-2, 343-3).

The federal government's guidance completely fails to account for the experiences of families such as John's, as does the federal government's unsupported suggestion (Mot. at 15) that being an uncle or first cousin is such a distant relationship that it does not constitute a close familial relationship. As explained above (at 6), while the term cousin can sometimes embrace distant relationships, it is entirely implausible to believe that the district court used the term that way, both because the common and primary definition of "cousin" is "a child of one's uncle or aunt,"[15] and because the district court understood that this Court's opinion required drawing a line between "close" familial relationships and other familial relationships.

---

[15] *See Oxford Dictionaries*, s.v. cousin (internet); *Merriam-Webster Dictionary*, s.v. cousin (internet). The terms "uncle" and "aunt" are commonly defined to mean a parent's sibling or the spouse of such a sibling. *See Oxford Dictionaries*, s.v. uncle; *Merriam-Webster Dictionary*, s.v. uncle; *Oxford Dictionaries*, s.v. aunt; *Merriam-Webster Dictionary*, s.v. aunt.

For all these reasons, defendants have not shown a likelihood of success on the merits of the position advanced in their motion to this Court. When evaluating the propriety of a stay, this Court has been clear that the stay applicant's likelihood of success must be "strong," and "more than a mere possibility of relief is required." *Nken*, 556 U.S. at 434 (quotation marks omitted). Here, defendants have failed to make this required threshold showing, and thus a stay is not warranted for that reason alone.

II. The Balance of the Equities Strongly Favors Denial of a Stay.

Balancing the equities implicated by a stay application requires the Court to determine whether the harm to other interested parties or the public outweighs the injury asserted by the applicant. *Trump v. IRAP*, 137 S. Ct. at 2087 (quoting *Barnes*, 501 U.S. at 1305). In conducting that analysis here, the Court should weigh heavily the irreparable harm that will be inflicted on the amici States and our residents if the federal government is permitted to define "close familial relationship[s]," 137 S. Ct. at 2088, in a way that categorically excludes close but non-nuclear family members from the protection of the remaining portion of the preliminary injunction.

For the reasons described in Point I, the federal government's narrow interpretation of this Court's June 26 decision will prevent many persons in the United States from receiving visits from family members with whom they have close and bona fide relationships. An ailing grandmother could not receive end-of-life care from her foreign granddaughter. A niece whose foreign aunt was like a mother to her could not bring that aunt to witness and celebrate her

wedding. And an orphaned child would not be permitted to receive a visit from the uncle who took care of her financial and emotional needs after her father's untimely death.

Under this Court's cases, such deprivations are a constitutionally-cognizable hardship to the affected United States–based persons. *See Moore*, 431 U.S. at 502 (tradition of sharing household with extended family "deserving of constitutional recognition"); *see also Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (noting in prisoners' visitation case "a right to maintain certain familial relationships, including . . . association between grandchildren and grandparents"). Moreover, the exclusions at issue hinder the amici States' ability to protect their residents' fundamental familial relationships to the extent allowed under other federal laws.[16] *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607-08 (1982) (discussing a State's interests in ensuring that its residents are "not excluded from benefits that are to flow from participation in the federal system" and in "securing observance of the terms under which it participates in" that system); *see*

---

[16] The federal government is mistaken in contending (Mot. at 33-34) that the Executive Order's case-by-case waiver provisions avert any such harm because a foreign national who "has a particularly close relationship with a more distant relative" may still qualify for entry. The Executive Order never describes the process of applying for a waiver, specifies a time frame for receiving a waiver, or sets any concrete guidelines for issuance of a waiver beyond providing a list of circumstances in which waivers "could be appropriate." Order § 3(c). And there is no guarantee that a waiver will be issued for any particular foreign national who seeks to visit a close family member in the United States, because the ultimate decision on whether to grant a waiver lies solely within a consular official's discretion. *See id.*

also Gerstel, *Rethinking Families*, *supra*, 26 Sociological F. at 4-5 ("Th[e] focus on . . . the nuclear family contains strong racial and ethnic—as well as class—biases".)

The federal government's impermissible exclusions will also result in continuing concrete and irreparable harms to amici States' economic and proprietary interests. The specter of unlawful exclusions creates barriers to attracting and retaining foreign students and employees at our universities, hospitals, and businesses. Many such persons may be unwilling to accept offers to work and study in our States in light of the federal government's stated intention to ban visits from their grandparents, grandchildren, or other close relatives. *Cf.* Gerstel, *Rethinking Families*, *supra*, 26 Sociological F. at 7-9 (discussing significance of extended family networks particularly for those in medical profession who often work long hours and have limited ability to control schedules). And the amici States will lose significant sources of taxes and other revenues that would otherwise be collected from the foreign visitors whom the Executive Order improperly excludes. These are some of the same interests that the district court's preliminary injunction was originally designed to protect, and some of the same harms this Court carefully sought to avoid when leaving certain portions of the preliminary injunction in place. *See* Va. Amicus Br. (16 States and D.C.) at 4-14, *Trump v. IRAP*, Nos. 16A1190, 16A1191 (Sup. Ct. June 21, 2017); Ill. Amicus Br. (16 States and D.C.) at 5-20, *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125.

On the other hand, defendants have not demonstrated that a stay pending this Court's review of the district court's July 13 order (or, alternatively,

pending review of the July 13 order by the Ninth Circuit) is necessary to prevent any irreparable harm to their interests. Defendants' generalized claim of harm to the federal government's interest in maintaining national security (Mot. at 37-38) is abstract and conclusory—unlike the concrete, immediate harms to the amici States and their residents outlined above. Nor are the harms of the amici States and their residents outweighed by the federal government's desire to avoid the administrative inconvenience of "alter[ing] its implementation of the Order in substantial respects" and communicating such changes to an extensive worldwide network of agencies (Mot. at 38). Indeed, defendants' assertions of harm are substantially undermined by their acknowledgement that the travel ban in § 2(c) will expire less than 90 days from now (Mot. at 8 [noting presidential memorandum clarifying effective date of all previously enjoined provisions of the Order]) and defendants' similar concession (Mot. at 24-25) that the refugee restrictions in § 6(a) and (b) of the Order will also shortly expire.

In sum, the balance of the equities here tips decidedly in favor of denying the federal government's request for a stay. While defendants have identified no appreciable harm that the district court's July 13 order will cause to the federal government's interests during the brief period for which the Order will be effective, a stay of the July 13 order would allow irreparable harm to be imposed on the amici States and our residents. The status quo should be preserved while this litigation continues.

CONCLUSION

The application to stay the injunction as modified should be denied.

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ANISHA DASGUPTA
Deputy Solicitor General
ZAINAB A. CHAUDHRY
Assistant Solicitor General
barbara.underwood@ag.ny.gov

July 2017

* *Counsel of Record*

(*Counsel listing continues on next page*)

XAVIER BECERRA
Attorney General
State of California
1300 I Street
Sacramento, CA 95814

GEORGE JEPSEN
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

MATTHEW P. DENN
Attorney General
State of Delaware
Carvel State Bldg., 6th Fl.
820 N. French Street
Wilmington, DE 19801

LISA MADIGAN
Attorney General
State of Illinois
100 W. Randolph Street,
12th Fl.
Chicago, IL 60601

THOMAS J. MILLER
Attorney General
State of Iowa
1305 E. Walnut Street
Des Moines, IA 50319

JANET T. MILLS
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of
Massachusetts
One Ashburton Place
Boston, MA 02108

HECTOR BALDERAS
Attorney General
State of New Mexico
408 Galisteo Street
Santa Fe, NM 87501

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street, N.E.
Salem, OR 97301

PETER F. KILMARTIN
Attorney General
State of Rhode Island
150 S. Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 North Ninth Street
Richmond, VA 23219

BOB FERGUSON
Attorney General
State of Washington
800 Fifth Avenue, Ste. 2000
Seattle, WA 98104

KARL A. RACINE
Attorney General
District of Columbia
One Judiciary Square
441 4th Street, N.W.
Washington, DC 20001

LE

Supreme Court, U S
FILED
JUL 15 2017
OFFICE OF THE CLERK

No. 16-1540 (16A1191)

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

STATE OF HAWAII, ET AL.

MOTION FOR CLARIFICATION OF JUNE 26, 2017, STAY RULING AND APPLICATION FOR TEMPORARY ADMINISTRATIVE STAY OF MODIFIED INJUNCTION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 16-1540 (16A1191)

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

STATE OF HAWAII, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR CLARIFICATION OF JUNE 26, 2017, STAY RULING
AND APPLICATION FOR TEMPORARY ADMINISTRATIVE STAY
OF MODIFIED INJUNCTION

Nearly three weeks ago, this Court issued its per curiam decision partially staying the injunctions below. Trump v. IRAP, No. 16-1436 (June 26, 2017). Since that time, the government has faithfully implemented Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), consistent with the terms of the Court's stay. In several respects not at issue here, the government identified -- and reflected in public guidance -- individuals who are not affected by the Court's stay and whose status as a visa or refugee applicant thus would not be affected.

In two important respects, however, respondents pressed further in an effort to strip this Court's stay of significant practical consequence. The district court adopted both of respondents' arguments, and denied the government's request for a stay pending this Court's review. The government therefore is left to seek this Court's immediate intervention.

First, for aliens abroad who seek admission as refugees, this Court held that the suspension in Section 6(a) of the Order and the annual cap in Section 6(b) "may not be enforced against an individual * * * who can credibly claim a bona fide relationship with a person or entity in the United States." IRAP, slip op. 13. Respondents do not contend that the government has applied Sections 6(a) and 6(b) to refugees who themselves have developed actual, bona fide relationships with U.S. entities. Rather, respondents object that, for every refugee who is likely to enter the United States while Sections 6(a) and 6(b) are in effect, the government has contracted with a resettlement agency to provide assistance to the alien once he eventually arrives in the United States, and the alien has a qualifying bona fide relationship on this basis. Prior to the refugee's arrival, however, the relationship is solely between the government and the agency, not between the agency and the refugee. Indeed, the agency typically has no contact with the refugee before his admission. Because the fact of an assurance does not itself create a relationship between a refugee and a resettlement agency, the government has not treated that fact alone

as sufficient to trigger the injunctions. To do so (as the district court did) would render the refugee portion of this Court's decision effectively meaningless.

Second, for aliens abroad who seek a visa, this Court similarly held that the suspension in Section 2(c) of the Order may not be enforced against an individual with a credible claim of a bona fide relationship to a U.S. person or entity, including "a close familial relationship" with a U.S. individual. IRAP, slip op. 12 (emphasis added). In interpreting what degree of closeness is required, the government looked to the waiver provision of Section 3(c)(iv) of the Order, which allows waivers for aliens who seek "to visit or reside with a close family member (e.g., a spouse, child, or parent)" in the United States. Order § 3(c)(iv). That waiver provision in turn reflected the provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., governing eligibility for family-based immigrant visas, which are limited to spouses, children, parents, and siblings. In light of related INA provisions and this Court's stay decision, the government has further interpreted the phrase "close familial relationship" to include fiancé(e)s and parents- and children-in-law.

At respondents' urging, however, the district court interpreted that phrase also to include grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, and siblings-in-law. Again, that interpretation empties the Court's

decision of meaning, as it encompasses not just "close" family members, but virtually all family members. Treating all of these relationships as "close familial relationship[s]" reads the term "close" out of the Court's decision. Moreover, by divorcing the Court's language from its context -- namely, the Order's waiver provision and the immigration provisions on which it was based -- the district court adopted an expansive definition untethered to relevant legislative enactments or Executive action.

Given the parties' disagreement, it would have been natural and appropriate for respondents to seek such clarification from this Court in the first instance. See, e.g., Swenson v. Stidham, 410 U.S. 904 (1973); cf. Stephen M. Shapiro et al., Supreme Court Practice 841 (10th ed. 2013). Instead, respondents sought clarification from the district court, which correctly denied their request. The court of appeals correctly held that it lacked jurisdiction over respondents' appeal of that denial, but it instructed the district court to entertain a motion to enforce or modify its injunction, which respondents then filed and the district court granted. At this point, this Court's intervention is both necessary and warranted. Only this Court can definitively settle whether the government's reasonable implementation is consistent with this Court's stay.

The government therefore respectfully submits this motion for clarification. In the alternative, the government has filed a notice of appeal, and this Court may grant a writ of certiorari

before judgment, or even a writ of mandamus, and vacate the district court's order insofar as that order granted respondents' motion to modify the preliminary injunction. In the event that the Court would prefer the government to seek review first in the court of appeals, the government requests a stay pending such an appeal. In all events, the government respectfully requests a temporary administrative stay of the district court's modified injunction pending this Court's disposition of this motion. Disrupting the government's implementation of the Order (which the district court's order is already accomplishing) is entirely unnecessary; once the Court rules, the government can address any aliens who would have been affected in the interim.

STATEMENT

1. Three provisions of the Order are at issue here. Section 2(c) suspends for 90 days entry of certain nationals of six countries that present heightened terrorism-related risks, subject to case-by-case waivers, pending a review of whether foreign governments provide adequate information regarding nationals seeking entry to this country. Trump v. IRAP, No. 16-1436 (June 26, 2017) (per curiam), slip op. 3. Section 6(a) suspends for 120 days adjudications of and travel under the United States Refugee Admission Program (Refugee Program), pending a review of that program. Id. at 3-4. Section 6(b) limits to 50,000 the number of persons who may be admitted as refugees in Fiscal Year 2017. Id. at 4.

Respondents in this case (No. 16-1540) are the State of Hawaii and Dr. Ismail Elshikh, a U.S. citizen, who is married to a U.S. citizen, and whose Syrian mother-in-law seeks a visa to enter the United States. Dr. Elshikh and Hawaii challenged Sections 2 and 6 in the United States District Court for the District of Hawaii. IRAP, slip op. 4-6. The district court entered a preliminary injunction barring application of Sections 2 and 6 in their entirety, including provisions directing internal reviews of the Nation's screening and vetting procedures and communications with foreign governments. Id. at 4-5. The Ninth Circuit largely affirmed the injunction with respect to Sections 2(c), 6(a), and 6(b), and vacated the injunction as to the provisions addressing internal reviews. Id. at 6.

A separate group of plaintiffs, the respondents in Trump v. IRAP, No. 16-1436, also challenged the Order in a suit in the United States District Court for the District of Maryland. IRAP, slip op. 4-5. That court enjoined Section 2(c), and the Fourth Circuit affirmed that injunction in substantial part. Id. at 5.

2. The government sought certiorari in both cases and a stay of both injunctions. IRAP, slip op. 5-7. On June 26, 2017, this Court granted the government's petitions for certiorari and issued a partial stay of both injunctions. Id. at 9-13. With respect to Section 2(c), the Court's stay ruling states:

> The injunctions remain in place only with respect to parties similarly situated to Doe, Dr. Elshikh, and Hawaii. In practical terms, this means that §2(c) may not be enforced

> against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States. All other foreign nationals are subject to the provisions of [the Order].

Id. at 12. The Court explained that "[t]he facts of these cases illustrate the sort of relationship that qualifies." Ibid. "For individuals, a close familial relationship is required." Ibid. The Court cited as an example "[a] foreign national who wishes to enter the United States to live with or visit a family member, like Doe's wife or Dr. Elshikh's mother-in-law." Ibid. "As for entities," the Court explained, "the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Order]." Ibid. The Court gave as examples "[t]he students from the designated countries who have been admitted to the University of Hawaii," "a worker who accepted an offer of employment from an American company," and "a lecturer invited to address an American audience." Ibid. By contrast, "a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion." Ibid.

The Court granted a similar partial stay of the injunction affirmed by the Ninth Circuit with respect to Sections 6(a) and 6(b). IRAP, slip op. 13. The Court ruled that Sections 6(a) and 6(b) "may not be enforced against an individual seeking admission as a refugee who can credibly claim a bona fide relationship with

a person or entity in the United States." Ibid. "As applied to all other individuals," however, the Court held that "the provisions may take effect." Ibid. As the Court explained, "when it comes to refugees who lack any such connection to the United States * * * , the balance tips in favor of the Government's compelling need to provide for the Nation's security." Ibid.

3. As this Court noted in its ruling, on June 14, 2017, the President had issued a memorandum to Executive Branch officials clarifying that the effective date of the enjoined provisions of the Executive Order would "be the date on which the injunctions in these cases 'are lifted or stayed with respect to that provision.'" IRAP, slip op. 7 (quoting Presidential Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence, 82 Fed. Reg. 27,965 (June 19, 2017) (Presidential Memorandum)). The Presidential Memorandum directed the relevant agencies to "begin implementation of each relevant provision of sections 2 and 6 of the [Order] 72 hours after all applicable injunctions are lifted or stayed with respect to that provision." 82 Fed. Reg. at 27,966.

The Departments of State and Homeland Security accordingly began implementing Sections 2(c), 6(a), and 6(b) on June 29, 2017 and commenced enforcement of those provisions at 8:00 p.m. Eastern Daylight Time on that day. The same day, those agencies and their components also published public guidance addressing various implementation issues, which the government provided to

respondents' counsel as it became available. D. Ct. Doc. 301, Exs. A, C, and D (July 3, 2017). Some of the guidance was subsequently updated as the agencies continued to review and consider the relevant issues. Id. at 7. Current versions of the public guidance are available online.[1]

4. a. On June 29, 2017, after receiving from the government the public guidance then available, respondents in this case (No. 16-1540) filed an emergency motion in the district court asking that court to "clarify" the operative scope of its injunction in light of this Court's June 26 stay ruling. D. Ct. Doc. 293-1, at 2. As relevant here, respondents urged the district court to interpret this Court's stay ruling to exempt from the Order two broad categories of aliens.[2]

First, respondents argued that this Court's June 26 stay ruling exempts from Section 6(a)'s refugee suspension and from

---

[1] See Bureau of Consular Affairs, U.S. Dep't of State, Important Announcement: Executive Order on Visas (State Visa Guidance), https://travel.state.gov/content/travel/en/news/important-announcement.html; Bureau of Population, Refugees, and Migration, U.S. Dep't of State, Fact Sheet: Information Regarding the U.S. Refugee Admission Program (State Refugee Fact Sheet), https://www.state.gov/j/prm/releases/factsheets/2017/272316.htm; U.S. Dep't of Homeland Sec. (DHS), Frequently Asked Questions on Protecting the Nation from Foreign Terrorist Entry into the United States (DHS FAQs), https://www.dhs.gov/news/2017/06/29/frequently-asked-questions-protecting-nation-foreign-terrorist-entry-united-states.

[2] The respondents in No. 16-1436 did not ask the district court in that case to clarify its injunction; instead, they filed an amicus brief in this case. D. Ct. Doc. 297-2 (June 30, 2017).

Section (b)'s refugee cap all applicants for admission as refugees as to whom the Department of State has obtained what is known as a sponsorship-assurance agreement from a U.S.-based refugee-resettlement agency. D. Ct. Doc. 293-1, at 11-12. An assurance is a contractual commitment between the resettlement agency -- one of nine nongovernmental organizations that have entered agreements with the government to provide resettlement services -- and the Department of State to provide certain services and assistance to the refugee following the refugee's arrival in the United States. D. Ct. Doc. 301-1, at 5 (Bartlett Decl. ¶¶ 14-17) (July 3, 2017). In order to facilitate successful resettlement, the Department of State obtains such an agreement for every refugee who is permitted to travel to this country before the refugee's arrival. See ibid. (¶ 16); D. Ct. Doc. 345, at 16 (July 13, 2017) (Addendum (Add.) 16). The resettlement agency, however, typically has no contact with the refugee until he or she arrives to the United States. D. Ct. Doc. 301-1, at 7 (Bartlett Decl. ¶ 21). Accordingly, the Department of State's guidance stated that an assurance agreement between a resettlement agency and the Department does not, by itself, establish a qualifying bona fide relationship between the refugee and a U.S. entity. See State Refugee Fact Sheet.

Second, respondents argued that the government's guidance has construed too narrowly the phrase "close familial relationship" in this Court's June 26 stay ruling. D. Ct. Doc. 293-1, at 7-11. Relying on this Court's ruling and on provisions of the INA, the

government's guidance interpreted that phrase to include a parent (including parent-in-law), spouse, fiancé(e), child, adult son or daughter, son-in-law, daughter-in-law, sibling (whether whole or half), and step relationships. See State Visa Guidance; DHS FAQs, Q29; see also Add. 11. The government's definition did not include grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law, and any other "extended" family members. Respondents argued that these excluded categories also constitute "close familial relationships" and that such relatives should therefore be categorically exempt from Sections 2(c), 6(a), and 6(b). D. Ct. Doc. 293-1, at 7-11.

b. On July 6, 2017, after expedited briefing, the district court denied the motion. D. Ct. Doc. 322, at 6. The court explained that "[b]ecause [respondents] seek clarification of the June 26, 2017 injunction modifications authored by the Supreme Court, clarification should be sought there, not here." Id. at 5. The district court "w[ould] not upset the Supreme Court's careful balancing and 'equitable judgment' brought to bear when 'tailor[ing] a stay' in this matter," nor would it "presume to substitute its own understanding of the stay for that of the originating Court's 'exercise of discretion and judgment' in '[c]rafting a preliminary injunction . . . dependent as much on the equities of a given case as the substance of the legal issues it presents.'" Ibid. (brackets in original; citation omitted).

Instead of seeking guidance from this Court as the district court suggested, respondents appealed. On July 7, 2017, the Ninth Circuit dismissed the appeal for lack of jurisdiction. Hawaii v. Trump, No. 17-16366 (C.A. Doc. 3). The district court's order denying their request for clarification, it held, was neither a final order nor immediately appealable under 28 U.S.C. 1292(a). C.A. Doc. 3, at 2. The court of appeals stated, however, that the district court could entertain a request to enforce or modify its existing injunction. Id. at 3. The court of appeals also denied respondents' alternative request for mandamus, holding that "the district court's denial of Plaintiffs' motion for clarification was not clear error." Id. at 3 n.1.

5. Respondents returned to the district court. On July 7, 2017, they filed a new motion presenting substantially the same arguments as in their motion for clarification and seeking (as relevant here) largely the same relief, but this time styled as seeking enforcement or modification of the district court's injunction. D. Ct. Doc. 328-1, at 4-15. The government opposed respondents' motion, arguing that any clarification respondents desired should be sought from this Court in the first instance, as the district court had indicated; that the relief respondents requested contradicts this Court's June 26 stay ruling; and that, if the district court were nevertheless inclined to grant any additional relief, it should stay its ruling to allow the government to seek prompt review in this Court and thus minimize

disruption and confusion. D. Ct. Doc. 338, at 3-15 (July 11, 2017).[3]

After expedited briefing, on July 13, 2017, the district court granted in substantial part respondents' motion to modify its injunction. Add. 9-26. First, the court held that every refugee as to whom the Department of State has obtained an assurance agreement from a resettlement agency has a qualifying bona fide relationship with a U.S. entity within the meaning of this Court's June 26 stay ruling, and therefore is exempt from Sections 6(a) and 6(b) of the Order. Add. 16-17. Second, the district court held that the government's interpretation of "close familial relationship" -- which includes "parents, parents-in-law, spouses, fiancés, children, adult sons or daughters, sons-in-law, daughters-in-law, siblings (whether whole or half), and step relationships," but not other relatives -- is too narrow. Add. 11; see Add. 11-15. The court held that "close familial relationship" also includes "grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States." Add. 26; see Add. 15.[4]

---

[3] The respondents in No. 16-1436 did not seek modification or enforcement of the injunction in that case, but instead again filed an amicus brief in the district court in this case. D. Ct. Doc. 339-1 (July 11, 2017).

[4] The district court also granted respondents' request to modify the injunction to forbid the government categorically from applying the Order to prohibit entry of aliens under the "Lautenberg Program," which "permits certain nationals of the

The district court denied respondents' request to modify its injunction in various other respects. Add. 18-22, 24. The court also denied without comment the government's request to stay its ruling pending appellate review. Add. 24.[5]

ARGUMENT

The district court's interpretation of this Court's June 26, 2017, stay ruling distorts this Court's decision and upends the equitable balance this Court struck. The district court's categorical holding that the Order may not be applied to any refugee applicant as to whom the Department of State has obtained a contractual commitment from a resettlement agency -- which includes every refugee permitted to enter the United States -- effectively eviscerates this Court's ruling partially staying the injunction as to Sections 6(a) and 6(b). And the district court's sweeping interpretation of "close familial relationship" (Trump v.

---

former Soviet Union and other countries with 'close family in the United States' to apply for refugee status." Add. 22; see Add. 22-23 (citing Pub. L. No. 101-167, § 599D, 103 Stat. 1261 (codified at 8 U.S.C. 1157)). The government had opposed respondents' request for categorical relief as to the Lautenberg Program because it includes grandparents and grandchildren. Add. 23. "In light of the [district court's] determination that grandparents and grandchildren are within the penumbra of 'close family' for purposes of the Supreme Court's June 26 decision," the district court rejected the government's position. Ibid.

[5] As discussed further below, see p. 17, infra, out of an abundance of caution, the government has also filed today a notice of appeal of the district court's decision modifying its injunction. See D. Ct. Doc. 346 (July 14, 2017) (docketed as No. 17-16426 (9th Cir.)).

IRAP, No. 16-1436 (June 26, 2017) (per curiam), slip op. 12) to encompass a wide range of distant relatives -- including cousins, uncles, and siblings-in-law -- effectively eliminates the "close" requirement and has no basis in this Court's ruling or the INA.

This Court should grant the government's motion to clarify the scope of this Court's stay in order to resolve the uncertainty created by the district court's mistaken ruling. Alternatively, the Court may construe this motion as a petition for a writ of certiorari or a writ of mandamus, grant the petition, and vacate the district court's modified injunction. If the Court prefers that the court of appeals first consider the scope of this Court's stay order, the government requests that the Court grant a stay pending disposition of that appeal. In all events, the government respectfully requests that this Court grant a temporary administrative stay of the district court's modified injunction pending disposition of this motion. See, e.g., Little Sisters of the Poor Home for the Aged v. Sebelius, 134 S. Ct. 893 (2013), injunction pending appeal granted, 134 S. Ct. 1022 (2014).

I. THIS COURT SHOULD CLARIFY THE SCOPE OF ITS OWN STAY RULING

A. Immediate relief in this Court is appropriate because the dispute concerns the meaning and operative effect of this Court's own stay order. This Court unquestionably has authority to clarify or modify its own rulings. It has done so even after issuing an opinion on the merits. See Swenson v. Stidham, 410 U.S.

904 (1973) (granting party's motion to modify opinion in argued case); cf. Shapiro 841 (noting that, "[i]n some circumstances" where a party before this Court "is not seeking a change in the Court's judgment on the merits * * * , it may be appropriate to file a motion to clarify or modify the opinion of the Court, rather than a petition for rehearing"). A fortiori, the Court may clarify or amend its own stay ruling in a case that is still pending before it for plenary consideration on the merits.

This Court should exercise that authority here because the parties' dispute concerns the correct interpretation of this Court's own June 26 stay order balancing the equities and crafting interim relief -- a legal question that only this Court can authoritatively resolve. Respondents initially sought "clarif[ication]" of "the scope of the [district court's] June 19, 2017 amended preliminary injunction." D. Ct. Doc. 293, at 3 (June 29, 2017). But as the district court recognized in denying that request, respondents' arguments in substance concerned only the meaning of this Court's June 26 ruling granting a partial stay of that injunction. D. Ct. Doc. 322, at 5. After respondents' appeal of that ruling was dismissed, respondents presented substantially the same arguments to the district court, changing only the label. Indeed, as both respondents and the court acknowledged, given the pendency of appellate proceedings involving the original injunction, the district court's authority was confined to "preserv[ing] the status quo or ensur[ing] compliance with its

earlier orders," i.e., the "preliminary injunction * * * as modified by the Supreme Court's June 26, 2017 order." Add. 9 & n.4; see D. Ct. Doc. 342, at 2 (July 12, 2017) ("agree[ing]" that the district court's "authority to modify its injunction is limited to what is necessary to preserve the status quo"). The parties' dispute and the district court's July 13 ruling thus turn entirely on the meaning of this Court's stay ruling.

Further litigation in the lower courts on that question would serve little purpose. The Ninth Circuit cannot conclusively determine the correct reading of this Court's stay ruling any more than the district court. Withholding authoritative clarification of this Court's ruling would only exacerbate the uncertainty the district court's ruling has created and delay final resolution of the stay's scope. That in turn would compromise the government's ability to implement the provisions of the Order, which this Court made clear should take effect with limited exceptions. The Court can and should avoid those difficulties and needless additional litigation by clarifying its June 26 stay ruling.

B. Out of an abundance of caution, to ensure that there is no impediment to this Court's prompt resolution of this issue, the government has also filed today a notice of appeal of the district court's decision modifying its injunction. See D. Ct. Doc. 346 (July 14, 2017) (docketed as No. 17-16426 (9th Cir.)). To the extent necessary, this Court thus may construe this motion as a

petition for a writ of certiorari before judgment, grant certiorari, and vacate the district court's modified injunction.

Alternatively, the Court may construe the motion as a petition for a writ of mandamus. See Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 428 (1978) (per curiam). This motion is accordingly being served on the district court. In the absence of an order of this Court definitively clarifying its stay ruling, mandamus would be warranted because "no other adequate means [would] exist" for the government to obtain the requested relief, as no lower court can conclusively determine the correct scope of a decision of this Court. Further lower-court litigation during the very window in which the Order was to take effect would only delay definitive resolution of the ruling's scope by this Court. In addition, the government's right to relief is "clear and indisputable" for the reasons discussed below. And the writ is appropriate as this case concerns "a question of public importance" and an issue of the interpretation of this Court's own ruling, which makes it "peculiarly appropriate that * * * action by this [C]ourt should be taken." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam) (brackets and citation omitted); see Cheney v. United States Dist. Court, 542 U.S. 367, 380-381 (2004) (mandamus standard).

II. THE DISTRICT COURT'S READING OF THIS COURT'S STAY RULING IS WRONG AND WOULD SEVERELY IMPAIR IMPLEMENTATION OF THE ORDER

The district court's ruling modifying its injunction rests on a deeply flawed interpretation of this Court's June 26 stay ruling. The government respectfully requests that the Court clarify its June 26 stay ruling in two respects: first, the existence of an assurance agreement between the Department of State and a refugee-resettlement agency as to a particular refugee applicant, standing alone, does not establish a qualifying bona fide relationship that exempts the applicant from Sections 6(a) and 6(b) of the Order; and second, the government has properly interpreted "close familial relationship[s]," IRAP, slip op. 12, consistent with this Court's stay ruling and the INA, to include only immediate relationships but not more distant relatives, such as grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins.

A. An Assurance Agreement Between A Refugee-Resettlement Agency And The Government By Itself Does Not Establish A Qualifying Bona Fide Relationship With A U.S. Entity

This Court's June 26 stay ruling held that Section 6(a)'s refugee suspension and Section 6(b)'s refugee cap "may take effect" as to "all" refugee applicants except those "who can credibly claim a bona fide relationship with a person or entity in the United States." IRAP, slip op. 13. The district court concluded, however, that every refugee applicant as to whom the federal government has entered an assurance agreement with a refugee-

resettlement agency automatically has a qualifying bona fide relationship with a U.S. entity, and is therefore exempt from Sections 6(a) and 6(b). This Court's ruling cannot plausibly bear that construction, which is irreconcilable with this Court's reasoning and would as a practical matter render the partial stay this Court granted as to the refugee provisions a dead letter.

1. To implement the Refugee Program, the Department of State enters into annual cooperative agreements with non-profit resettlement agencies in the United States. See D. Ct. Doc. 301-1, at 5 (Bartlett Decl. ¶¶ 14-15). Currently, nine agencies have entered into agreements with the United States to provide resettlement services. Ibid. (¶ 14).[6] Before any refugee travels to the United States under the Refugee Program, the Department of State obtains a commitment (an "assurance") from a resettlement agency. Ibid. (¶ 16); see, e.g., id. at 63 (Attach. No. 3). As the district court observed, "[t]he parties do not dispute that before any refugee is admitted to the United States under the [Refugee Program], the Department of State must receive" an assurance agreement. Add. 16.

As part of its assurance, the resettlement agency agrees that, once the refugee arrives in the United States, the resettlement

---

[6] The nine resettlement agencies are Church World Service, Episcopal Migration Ministries, Ethiopian Community Development Council, HIAS, International Rescue Committee, Lutheran Immigration and Refugee Service, United States Committee for Refugees and Immigrants, United States Conference of Catholic Bishops, and World Relief. D. Ct. Doc. 301-1, at 5 (Bartlett Decl. ¶ 14).

agency (or a local affiliate) will provide certain benefits for that refugee in exchange for payment from the government. D. Ct. Doc. 301-1, at 6-7 (Bartlett Decl. ¶ 20). The cooperative agreement specifies the services that the resettlement agency must provide to each refugee and provides government-funded compensation to the resettlement agency for doing so. Id. at 5 (¶ 15); see id. at 24 (Attach. No. 2). The services provided by resettlement agencies and their local affiliates throughout the country include placement, planning, reception, and basic needs and core service activities for arriving refugees. Id. at 6-7 (¶ 20). Once a given refugee has been approved by DHS and passes all required medical examinations, he is assigned to a resettlement agency, which submits the assurance agreeing to provide the required services after the refugee arrives in the United States. Id. at 5 (¶¶ 13-15); see id. at 63 (Attach. No. 3).

A government-arranged assurance agreement does not by itself establish a "bona fide relationship" between the refugee and an "entity in the United States" of the type this Court described in its stay ruling. IRAP, slip op. 13. The assurance is not an agreement between the resettlement agency and the refugee; rather, it is an agreement between that agency and the federal government. In other words, the government enters into an agreement to provide the refugee with certain services once the refugee arrives, in order to ensure a smooth transition into the United States. Significantly, however, resettlement agencies typically do not

have any direct contact with the refugees they assure before their arrival in the United States. D. Ct. Doc. 301-1, at 7 (Bartlett Decl. ¶ 21). Rather, the resettlement agency works with individuals and organizations in the United States, including any U.S. ties a refugee may otherwise have in the United States, to prepare for the refugee's arrival without directly interacting with the refugee abroad. Ibid.

The indirect link between a resettlement agency and refugee that exists by virtue of such an assurance stands in stark contrast to the sort of relationships this Court identified as sufficient in its stay ruling. Unlike students who have been admitted to study at an American university, workers who have accepted jobs at an American company, and lecturers who come to speak to an American audience, cf. IRAP, slip op. 12, refugees do not have any freestanding connection to resettlement agencies that is separate and apart from the Refugee Program by virtue of the agencies' assurance agreement with the government. Nor can the exclusion of an assured refugee plausibly be thought to "burden" a resettlement agency, apart from an opportunity to perform the resettlement services for which the government has contracted if a refugee is admitted. Id. at 11.

The district court nevertheless held that an assurance agreement standing alone does establish a qualifying bona fide relationship between the refugee and the resettlement agency because it is "formal," "binding," refugee-specific, and "issued

in the ordinary course." Add. 17. But the court's focus on those features misses the fundamental point that an assurance agreement does not create any relationship whatsoever with the refugee -- much less one that is independent of the refugee-admission process itself. The common thread among the hypothetical worker, student, and lecturer this Court described as potential examples of aliens with qualifying relationships is that each one has an independent relationship with a U.S. entity, such that the entity would suffer concrete hardship from the alien's exclusion. IRAP, slip op. 12. The same simply cannot be said of refugees to whom a resettlement agency will provide services after the refugee arrives in this country pursuant to a contract with the U.S. government. The resettlement agency suffers no greater injury than the hypothetical entities this Court described that might "enter[] into a relationship simply to avoid" the Order by "contact[ing] foreign nationals" and "add[ing] them to client lists." Ibid.

Respondents further asserted below that resettlement agencies are harmed because they have devoted private resources to refugee work and may lose federal funding. See D. Ct. Doc. 328-1, at 12. Even assuming this to be true, any such harm flows not from any independent, pre-existing relationship with the refugee formed in the ordinary course. It exists solely as a result of the resettlement agencies' contracts with the government. The district court stated that this Court's stay ruling does not "require[] a refugee to enter into a contract with a United States

entity" to have a qualifying relationship. Add. 17. But the refugee herself must have some relationship with a U.S. entity. Otherwise, the test this Court articulated would be meaningless.

2. Here, as the district court noted, it is undisputed that, "before any refugee is admitted to the United States under the [Refugee Program], the Department of State must receive a commitment ('assurance') from a resettlement agency." Add. 16. Thus, as the government showed below, and neither respondents nor the district court disputed, approximately 24,000 refugees already have been assured -- which is more than the number of refugees who would likely be scheduled to enter during the period Sections 6(a) and 6(b) are in effect.[7] The district court's reading of this Court's stay would therefore mean that all of those refugees have qualifying bona fide relationships, and all of them are therefore exempt from the Order. Respondents asserted below that another 175,000 potential refugees do not yet have assurances. D. Ct. Doc. 342, at 10. That is irrelevant because those refugees are unlikely to enter while the Order is in effect. Section 6(a) applies only for 120 days from this Court's June 26 ruling, see pp. 5, 8, supra, and thus will expire October 24, 2017. And Section 6(b) applies only during Fiscal Year 2017, which ends

---

[7] D. Ct. Doc. 301-1, at 5 (Bartlett Decl. ¶ 17) ("As of June 30, 2017, a total of 23,958 refugees in the [Refugee Program] were assured by a resettlement agency. It is unlikely that all the refugees who are already assured would travel to the United States during the next 120 days while [the Order's] refugee suspension is partially in effect.").

September 30, 2017. Refugees who would not enter during those periods are not affected by those provisions of the Order or, consequently, by this Court's stay.

The district court's ruling, in short, would mean that the stay this Court crafted after carefully balancing the equities covers virtually no refugee. Sections 6(a) and 6(b) thus would be unable to "take effect" as this Court explicitly intended. IRAP, slip op. 13. This Court's stay ruling should not be construed in a way that renders its application to Sections 6(a) and 6(b) largely inoperative. Cf. Corley v. United States, 556 U.S. 303, 314 (2009) ("[B]asic interpretive" principles require that "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (brackets and citation omitted)).

B. The Government Has Properly Construed "Close Familial Relationship" Consistent With This Court's Ruling And The INA To Include Only Certain Immediate Relationships

The district court also misread the exception this Court identified for aliens seeking entry who have a U.S. relative. This Court's June 26 stay ruling provides that, for a foreign national to be exempt from the Order based on a "credible claim of a bona fide relationship with a person * * * in the United States," "a close familial relationship is required." IRAP, slip op. 12. Because the express terms of that ruling make clear that only "close familial relationship[s]" count, ibid. (emphasis added), a line necessarily must be drawn between such relationships and more

attenuated family connections. The government has appropriately construed that language to include only certain immediate relationships -- parent (including parent-in-law), spouse, fiancé(e), child, adult son or daughter, son-in-law, daughter-in-law, sibling (whether whole or half), and step relationships -- but to exclude other, more distant relatives. Add. 6; see State Visa Guidance; State Refugee Fact Sheet; DHS FAQs, Q29. That tailored understanding comports with this Court's opinion, the most relevant provisions of the INA, and the facts before this Court when it issued the stay. By contrast, the district court disregarded those interpretive guideposts and instead adopted a boundless conception of "close family" -- covering grandparents, grandchildren, siblings-in-law, aunts, uncles, nieces, nephews, and cousins -- that essentially eliminates the "close" requirement by covering virtually every conceivable familial connection.

1. To begin, when this Court balanced the equities and identified circumstances in which a foreign national's connection to the United States is insufficient to outweigh the government's national security interests, it pointed in part to the Executive Order itself. IRAP, slip op. 11. As the Court explained, the Order "distinguishes between foreign nationals who have some connection to this country, and foreign nationals who do not, by establishing a case-by-case waiver system primarily for the benefit of individuals in the former category." Ibid.

Notably, the Court specifically cited the waiver provision, the most relevant subsection of which applies to a foreign national who "seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa," where "the denial of entry during the suspension period would cause undue hardship." Order § 3(c)(iv) (emphases added); see IRAP, slip op. 11. The Court's reference to "close familial relationship[s]," which echoes the waiver provision for "close family member[s]," as well as the Court's specific reference to that provision in explaining the types of connections that are sufficient, indicate that the Court envisioned exempting a similarly limited set of family members from the Order. The district court disregarded the Order's waiver provision and this Court's reference to it.

2. The specific lines the government has drawn in implementing this Court's ruling -- like the definition of "close family member" in Section 3(c)(iv) of the Executive Order -- are derived from the INA. The INA reflects congressional policies that accord special status to certain family relationships over others. See Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2197-2198 (2014) (opinion of Kagan, J.). The long-settled maxim that "equity follows the law," Hedges v. Dixon County, 150 U.S. 182, 192 (1893), makes federal immigration law an appropriate point of reference.

Section 201 of the INA defines "immediate relatives" -- the "most favored" family-based immigrant visa category, Cuellar de Osorio, 134 S. Ct. at 2197 (opinion of Kagan, J.) -- as "the children, spouses, and parents" of U.S. citizens. 8 U.S.C. 1151(b)(2)(A)(i). Step-relationships are included in the INA's definitions of "child" and "parent." See 8 U.S.C. 1101(b)(1)-(2). Section 203, concerning family-based preferences in allotting immigrant visas, specially privileges the following relationships: unmarried and married sons and daughters (age 21 or older) of U.S. citizens; siblings of U.S. citizens; and spouses, unmarried children under the age of 21, and unmarried sons and daughters (age 21 or older) of lawful permanent residents. See 8 U.S.C. 1153(a). Half-siblings are included in the sibling preference. See 9 U.S. Dep't of State, Foreign Affairs Manual 102.8-3 (2016). The fiancé(e) relationship also is recognized and given special accommodation in the INA. See 8 U.S.C. 1101(a)(15)(K), 1184(d). The government's definition treats all of these family relationships as "close familial relationship[s]" within the meaning of this Court's ruling.

Contrary to the district court's characterization, the government's reliance on the family-based visa provision of the INA is hardly "cherry-picking." Add. 12. The government's definition of close family members is drawn from the INA provisions governing which U.S. citizens and lawful permanent residents can petition for an immigrant visa for a family member abroad. While

even that does not create an entitlement for the alien to enter the United States -- the alien must independently satisfy the eligibility criteria for entry to the United States -- Congress has identified those persons who have a sufficient interest in unification to petition for an alien to come to the United States permanently. This is the most obvious touchstone for the class of close family members for whom the denial of a visa could plausibly be thought to affect the rights of "people * * * in the United States who have relationships with foreign nationals abroad." IRAP, slip op. 10; see id. at 10-11 (explaining that, under Kleindienst v. Mandel, 408 U.S. 753, 770 (1972), U.S. plaintiffs may challenge the exclusion of a foreign national that assertedly affects their own First Amendment interests).

In contrast, the district court relied on a strained analogy to cases involving local housing ordinances and grandparents petitioning for visitation rights. In Moore v. City of East Cleveland, 431 U.S. 494 (1977), for example, the Court invalidated limitations on living arrangements of people in the United States, all of whom indisputably had due-process rights. See Add. 14. That hardly supports the proposition that such distant family members have a cognizable stake in whether their alien relatives abroad can enter the country. In this very different context, the appropriate definition of "close family members" is the relationship that enables an individual in the United States to petition for an immigrant visa on the alien's behalf. See Cuellar

de Osorio, 134 S. Ct. at 2213 (opinion of Kagan, J.) (noting that "the grandchildren, nieces, or nephews of citizens [are] relationships [that] d[o] not independently entitle [those family members] to visas"); see also INS v. Hector, 479 U.S. 85 (1986) (per curiam) (INA did not permit consideration of hardship to niece of deportee, notwithstanding de facto parent-child relationship); Moreno-Morante v. Gonzales, 490 F.3d 1172, 1175-1178 (9th Cir. 2007) (similar as to grandchild).

Other statutory provisions confirm this conclusion. Within the INA, for example, a provision that establishes one of the various particular grounds on which aliens are inadmissible also builds in an "[e]xception for close family members," with reference specifically to "parent, spouse, son, daughter, brother, or sister" relationships. 8 U.S.C. 1182(a)(3)(D)(iv). A law concerning Iraqi refugees enacted in 2008 employed the phrase "close family members" and stated that the phrase's meaning is "described in section 201(b)(2)(A)(i) or 203(a) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i) and 1153(a))."[8] Those are the same sections of the INA on which the government primarily relies here. In contrast to those "close familial relationship[s]," the INA does not provide comparable immigration benefits for grandparents, grandchildren, brothers-in-law,

---

[8] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1243(a)(4), 122 Stat. 396 (codified as amended at 8 U.S.C. 1157 note).

sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States.

To the extent the district court addressed the INA at all, it relied on INA provisions or implementing regulations that are not relevant to visa issuance or that otherwise reflect narrow exceptions to the general rules. For example, the court relied on the fact that, by regulation, a juvenile alien who cannot be released to the custody of his or her parents may be released to an aunt, uncle, or grandparent. Add. 13 (citing Reno v. Flores, 507 U.S. 292, 297, 301 (1993), and 8 C.F.R. 236.3(b)(1)(iii)). But that regulation sheds no light on the most relevant inquiry for purposes of implementing the injunction, i.e., what family relationship is sufficient to permit an individual to petition for a visa for aliens abroad.

The district court also relied on the fact that a provision in the Family Sponsor Immigration Act of 2002, Pub. L. No. 107-150, 116 Stat. 74, defines an alien's sister-in-law, brother-in-law, grandparents, and grandchildren as "close family." Add. 13 (citing § 2(a), 116 Stat. 74 (codified at 8 U.S.C. 1183a(f)(5))). That provision does not create the ability to petition for a visa; it only establishes who may serve as a financial sponsor for certain aliens. See 8 U.S.C. 1183a.

Even in that context, the provision reflects the same distinction between close and extended family drawn by the government. Under 8 U.S.C. 1183a(f)(1)(D) and (4), a family

sponsor must be the same relative who is petitioning under 8 U.S.C. 1154 to classify the alien as a family-sponsored or employment-based immigrant (or a relative with a significant ownership interest in the entity filing an employment-based petition). See 8 U.S.C. 1153(a) and (b). Only spouses, parents, sons, daughters, and siblings may file family-sponsored petitions, and the eligible "relatives" in the employment-based context are limited to the same family members. See 8 U.S.C. 1154(a); 8 C.F.R. 213a.1 (defining relative to include spouse, parents, children, and siblings); see also 71 Fed. Reg. 35,732, 35,733 (June 21, 2006) (defining "'relative,' for purposes of the affidavit of support requirement, to include only those family members who can file alien relative visa petitions"). Only when a petitioner has died and the petition either converts to a widow(er) petition or the Secretary of Homeland Security reinstates the petition on humanitarian grounds can one of the extended family members serve as a financial sponsor under this provision. See 8 U.S.C. 1183a(f)(5)(B)(i) and (ii). And even then, siblings-in-law and grandparents only serve as financial sponsors; they cannot petition for a visa applicant. Cf. Cuellar de Osorio, 134 S. Ct. at 2213 (opinion of Kagan, J.) ("grandchildren, nieces, or nephews of citizens [are] relationships [that] d[o] not independently entitle [those family members] to visas").

The district court also cited (Add. 13 n.8) a human-trafficking regulation that allows grandchildren, nieces, and

nephews to be eligible for T visas (for victims of human trafficking), but only if DHS determines that they face "a present danger of retaliation as a result of the principal's escape from the severe form of trafficking in persons or cooperation with law enforcement." 81 Fed. Reg. 92,266, 92,280 (Dec. 19, 2016). Similarly, the district court relied on DHS regulations that allow an individual to "apply for asylum if a 'grandparent, grandchild, aunt, uncle, niece, or nephew' resides in the United States." Add. 13 n.8 (citing 69 Fed. Reg. 69,480, 69,488 (Nov. 29, 2004)). But those provisions were compelled by a negotiated agreement with Canada that included broader familial definitions than typically available under the INA. See 69 Fed. Reg. at 69,480 (discussing "Safe Third Country Agreement").

The remaining INA provisions relied on by the district court (Add. 13 n.8) apply only where the usual close family member has died. Under 8 U.S.C. 1433(a), a grandparent can apply on behalf of a grandchild only if the U.S. citizen-parent has died. And the provisions of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, see Add. 13 n.8, similarly are applicable only if the grandchild is an orphan and "both * * * parents died as a direct result of * * * [the 9/11 attacks]," and at least one of the parents was, on September 10, 2001, a U.S. Citizen or Lawful Permanent Resident. § 421(b)(3), 115 Stat. 357.

Notably, in cases in which an alien abroad has a particularly close relationship with a more distant relative, such as where a

minor child is orphaned and is raised by an aunt and uncle, he might be a potential candidate for a case-by-case waiver under Section 3(c) of the Order, which provides a non-exclusive list of circumstances that might qualify an individual for a waiver. But those exceptions to the normal INA rules, which apply only in narrow and factually distinguishable circumstances, do not provide a basis for disregarding the typical definition of close familial relationships in the INA.

3. Finally, the government's definition of close family members is consistent with the factual context for this Court's stay ruling. Although the Court did not catalogue exhaustively which "close familial relationships" are sufficient to exempt an alien from the Order, the Court left the injunction in place only for persons "similarly situated" to John Doe #1 and Dr. Elshikh. IRAP, slip op. 10. The Court also explained that "[t]he facts of these cases illustrate the sort of relationship that qualifies," citing Doe #1's wife and Dr. Elshikh's mother-in-law (who is also the mother of Elshikh's U.S.-citizen wife). Id. at 12. Those types of immediate relationships reflect the reason why the Court determined that certain ties to family members in the United States weigh in favor of leaving the injunction in effect as to such persons: the U.S. relative "can legitimately claim concrete hardship if that person is excluded." Id. at 13. The same is true of other original plaintiffs in these cases before the Court, who sought entry of fiancé(e)s and siblings. 16-1436 Pet. 15 n.7.

The district court read this Court's reference to Dr. Elshikh's mother-in-law as creating a much larger exception, unmoored from the INA and the Order's waiver provision. That is incorrect. This Court did not declare that a "mother-in-law" automatically has a qualifying "close familial relationship"; rather, it examined "[t]he facts of these cases," IRAP, slip op. 12, from which it was apparent that Dr. Elshikh's mother-in-law would in fact have a qualifying relationship as the mother of Dr. Elshikh's wife, herself a U.S. citizen. D. Ct. Doc. 66-1, at 2-4 (Elshikh Decl. ¶¶ 1, 4) (Mar. 8, 2017). And the Court cited Dr. Elshikh's mother-in-law as a "foreign national who wishes to enter the United States to live with or visit a family member," IRAP, slip op. 12, which she of course would do by living with or visiting her daughter. The Court's statement that Dr. Elshikh's mother-in-law has a "close familial relationship" thus did not necessarily reflect a categorical determination to privilege the mother-in-law relationship as such, even though Congress in the INA did not. Out of an abundance of caution, however, the government has implemented the Order in its guidance to include parents-in-law (and children-in-law) as having qualifying bona fide relationships. See pp. 10-11, supra.

Importantly, as with Dr. Elshikh's mother-in-law, parents-in-law of persons in the United States will typically also be parents of persons in the United States, because spouses typically live together. This places the parent-in-law relationship in a

fundamentally different position from the other relatives that the district court included. For example, siblings-in-law of persons in the United States are far less likely to be siblings of persons in the United States, because siblings often live apart. And the likelihood is even lower for cousins and the other types of more distant relatives that the district court held are not covered by the stay. Simply put, the fact that this Court held that Dr. Elshikh's mother-in-law is exempt from the Order's application cannot be read as holding that virtually all family members are exempt from the Order, especially given the Court's clear admonition that "a close familial relationship is required." IRAP, slip op. 12 (emphasis added).

III. THIS COURT SHOULD STAY THE DISTRICT COURT'S MODIFIED INJUNCTION PENDING CLARIFICATION OF THIS COURT'S STAY RULING

A. The government respectfully requests that this Court grant a temporary administrative stay of the district court's modified injunction pending disposition of this motion and that it direct a prompt response by respondents. See, e.g., Little Sisters of the Poor, 134 S. Ct. 893 (granting temporary injunction pending briefing on and consideration of injunction pending appeal and ordering response to application). The Court has authority under the All Writs Act, 28 U.S.C. 1651, to stay the district court's ruling, which purports to interpret, but in fact contravenes, a prior ruling of this Court in a case still pending before the

Court.[9] The Court should exercise that authority because all of the relevant considerations support a stay here. See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); see also Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

First, there is no question that these issues warrant review by this Court. The Court already has granted certiorari and a stay in this case, recognizing the important governmental interests at stake in enforcement of the Order. IRAP, slip op. 9, 11-12. The issues presented concern the interpretation of this Court's stay ruling, which only this Court can definitively resolve. Requiring the parties to litigate first in the court of appeals would serve no purpose and would merely delay the case from reaching this Court. See pp. 16-17, supra. Second, there is at least a fair prospect that the Court will reject the district court's misinterpretation of that ruling. See pp. 18-35, supra.

Third, the balance of equities and public interest strongly support a stay. The Court already has granted a stay of the district court's original injunction. IRAP, slip op. 9-13. As the Court underscored in that ruling, the government's "interest in preserving national security is 'an urgent objective of the

---

[9] The Court also may stay a district-court ruling pending a petition for a writ of certiorari under 28 U.S.C. 2101(f) or pending a petition for a writ of mandamus under this Court's Rule 23 and the All Writs Act. See Perry, 558 U.S. at 190. As noted, out of an abundance of caution, the government is pursuing all of these avenues in the alternative, see pp. 17-18, supra, which eliminates any question of the Court's authority to grant a stay.

highest order,'" and both that interest and the Executive's authority "are undoubtedly at their peak when there is no tie between [a] foreign national and the United States." Id. at 11 (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010)); see id. at 13 (holding that, for refugees who lack a qualifying bona fide relationship with a U.S. person or entity, the equitable "balance tips in favor of the Government's compelling need to provide for the Nation's security"). The same considerations strongly support a stay of the district court's ruling that effectively narrows the stay this Court granted.

The fact that the government is now in the midst of implementing the Order pursuant to this Court's June 26 stay ruling magnifies the need for an administrative stay. The government began implementing the Order subject to the limitations articulated by this Court more than two weeks ago, on June 29, which has entailed extensive, worldwide coordination among multiple agencies and issuing public guidance to provide clarity and minimize confusion. Add. 6; pp. 8-9, supra. The district court's ruling requires the government immediately to alter its implementation of the Order in substantial respects, inviting precisely the type of uncertainty and confusion that the government has worked diligently to prevent. The Court can and should prevent such needless uncertainty and confusion by staying the district court's injunction until this Court can definitively resolve the issues presented.

B. For the same reasons, if the Court concludes that the court of appeals should address the correctness of the district court's interpretation of this Court's stay ruling in the first instance, the Court should further grant a stay of the district court's modified injunction pending disposition of that appeal. The Court, or a single Justice, has authority to stay a district-court order pending appeal to a court of appeals.[10] A stay pending that appeal would help to minimize the disruption and practical difficulties that would be created if the district court's order remains operative for a substantial period but is later vacated or stayed.

C. The government requested a stay from the district court, which denied the government's request. Add. 24. The government respectfully submits that, in light of the unique posture of the litigation, this case presents "extraordinary circumstances" (Sup. Ct. R. 23.3) in which seeking a stay from the court of appeals first is unnecessary: the government seeks clarification by this Court of the meaning of its own June 26 stay ruling, and it is therefore appropriate for this Court to grant a temporary stay pending its resolution of that request. In addition, given the government's strong interest in implementing the Order consistent with this Court's stay, a timely resolution of the issues presented

---

[10] See, e.g., West Virginia v. EPA, 136 S. Ct. 1000 (2016); Ashcroft v. North Jersey Media Grp., Inc., 536 U.S. 954 (2002); INS v. Legalization Assistance Project, 510 U.S. 1301 (1993) (O'Connor, J., in chambers); United States Dep't of Def. v. Meinhold, 510 U.S. 939 (1993).

herein is essential. Seeking resolution in the Ninth Circuit about the meaning of this Court's stay followed by a near-certain request for this Court's review by the non-prevailing party would result in unnecessary delay. Out of an abundance of caution, however, the government will also be filing a protective stay motion in the court of appeals. But given that the dispute concerns this Court's stay ruling and the exigencies presented by ongoing implementation of the Order, the government respectfully submits that this Court should grant a temporary administrative stay without awaiting action by the court of appeals.

CONCLUSION

The Court should clarify its June 26 stay ruling as set forth above. In the alternative, the Court may construe this motion as a petition for a writ of certiorari before judgment or as a petition for a writ of mandamus and should grant the petition and vacate the district court's modified injunction. If the Court would prefer that the government pursue review in the court of appeals in the first instance, the Court should stay the district court's injunction pending disposition of that appeal. In all events, the Court should grant a temporary administrative stay of the modified injunction pending disposition of this motion.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

JULY 2017

ADDENDUM

District Court Order Granting in Part and Denying in Part Plaintiffs' Motion To Enforce, or, in the Alternative, To Modify Preliminary Injunction (D. Haw. July 13, 2017) 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAI'I and ISMAIL ELSHIKH, Plaintiffs, vs. DONALD J. TRUMP, *et al.*, Defendants.	CV. NO. 17-00050 DKW-KSC **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO ENFORCE, OR, IN THE ALTERNATIVE, TO MODIFY PRELIMINARY INJUNCTION**

INTRODUCTION

On June 26, 2017, the United States Supreme Court granted certiorari in this matter, granted in part the Government's stay application, "and narrow[ed] the scope of the injunction[]" entered by this Court with respect to Sections 2(c), 6(a), and 6(b) of Executive Order 13,780.[1] *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436 (16A1190) and 16-1540 (16A1191), slip op. at 11–12 (U.S. June 26, 2017) [hereinafter Slip. Op.] (per curiam). Plaintiffs challenge the Government's implementation of the non-enjoined portions of EO-2, asking this Court to enforce or, in the alternative, to modify the scope of the existing preliminary injunction.

[1]Executive Order 13,780 is entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 13209 (Mar. 6, 2017) [hereinafter EO-2].

See Pls.' Mot. to Enforce or, In the Alternative, to Modify Prelim. Inj., ECF No. 328 [hereinafter Motion].

Upon careful consideration of the parties' expedited submissions, the Court concludes that on the record before it, Plaintiffs have met their burden of establishing that the requested injunctive relief is necessary to preserve the status quo pending appeal regarding the definition of "close familial relationship" employed by the Government with respect to Sections 2(c), 6(a) and 6(b) of EO-2. Plaintiffs have similarly met their burden with respect to refugees with a formal assurance, as it relates to the Government's implementation of Sections 6(a) and 6(b) of EO-2, and participants in the Lautenberg Program. Plaintiffs' Motion is accordingly GRANTED in these respects and DENIED to the extent other relief is sought, for the reasons detailed below.

BACKGROUND

The Court briefly recounts the factual and procedural background relevant to Plaintiffs' Motion.

I. Prior Proceedings

A. This Court's March 29, 2017 Preliminary Injunction

On March 15, 2017, the Court temporarily enjoined Sections 2 and 6 of EO-2 nationwide ("TRO"). *See Hawaii v. Trump*, --- F. Supp. 3d ---, 2017 WL 1011673 (D. Haw. Mar. 15, 2017). Upon Plaintiffs' motion, full briefing, and a March 29,

2017 hearing, the Court converted the TRO into a preliminary injunction ("PI"). *Hawaii v. Trump*, --- F. Supp. 3d ---, 2017 WL 1167383 (D. Haw. Mar. 29, 2017). The Government appealed the Court's ruling on March 30, 2017. Notice of Appeal, ECF No. 271.

B. The Ninth Circuit's June 12, 2017 Opinion

The Ninth Circuit's June 12, 2017 *per curiam* opinion affirmed the injunction as to Section 2(c), suspending entry of nationals from the six designated countries for 90 days; Section 6(a), suspending the U.S. Refugee Admissions Program ("USRAP") for 120 days; and Section 6(b), capping the entry of refugees to 50,000 in fiscal year 2017. *Hawaii v. Trump*, --- F.3d ---, 2017 WL 2529640, at *29 (9th Cir. June 12, 2017) (per curiam). The Ninth Circuit vacated the portions of the injunction that prevented the Government from conducting internal reviews, as otherwise directed in Sections 2 and 6, and the injunction to the extent that it ran against the President. *Id.*, 2017 WL 2529640, at *29. The Ninth Circuit remanded to this Court with instructions to enter an amended injunction consistent with its opinion. This Court accordingly entered an amended injunction on June 19, 2017, upon issuance of the expedited mandate. Am. Prelim. Inj., *Hawaii v Trump*, No. 1:17-cv-00050-DKW-KSC (D. Haw. June 19, 2017), ECF No. 291.

II. The Supreme Court's June 26, 2017 Order

The Government petitioned for certiorari and filed an application to stay both the preliminary injunction entered in this case and the one entered by the District of Maryland in a case now consolidated on appeal. *Int'l Refugee Assistance Project v. Trump*, --- F. Supp. 3d ---, 2017 WL 1018235 (D. Md. Mar. 16, 2017) [hereinafter *IRAP*] (issuing preliminary injunction); *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. May 25, 2017) (No. TDC-17-0361, D. Md.; renumbered No. 17-1351, 4th Cir.). On June 26, 2017, the Supreme Court granted certiorari in both cases. Slip Op. at 9. The Supreme Court also granted "the Government's applications to stay the injunctions, to the extent the injunctions prevent enforcement of §2(c) with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States," Slip Op. at 11–12.

More specifically, the Supreme Court stayed the preliminary injunctions relating to Section 2(c) in the following manner—

> The injunctions remain in place only with respect to parties similarly situated to Doe, Dr. Elshikh, and Hawaii. In practical terms, this means that §2(c) may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States. All other foreign nationals are subject to the provisions of EO-2.

Slip Op. at 12. The Supreme Court explained that the facts in this case and in *IRAP* "illustrate the sort of relationship that qualifies"—

> For individuals, a close familial relationship is required. A foreign national who wishes to enter the United States to live with or visit a family member, like Doe's wife or Dr. Elshikh's mother-in-law, clearly has such a relationship. As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO-2. The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity. So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience. Not so someone who enters into a relationship simply to avoid §2(c): For example, a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion.

Slip Op. at 12.

With respect to the enjoined portions of Section 6 relating to refugee admissions and the refugee cap, the Supreme Court reasoned that the "equitable balance struck [with respect to Section 2(c)] applies in this context as well." Slip Op. at 13. It held—

> An American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded. As to these individuals and entities, we do not disturb the injunction. But when it comes to refugees who lack any such connection to the United States, for the reasons we have set out, the balance tips in favor of the Government's compelling need to provide for the Nation's security.
>
> The Government's application to stay the injunction with respect to §§6(a) and (b) is accordingly granted in part. Section 6(a) may not be enforced against an individual seeking admission as a

> refugee who can credibly claim a bona fide relationship with a person or entity in the United States. Nor may §6(b); that is, such a person may not be excluded pursuant to §6(b), even if the 50,000-person cap has been reached or exceeded.

Id. (internal citations omitted).

III. Plaintiffs' Challenge To The Government's Implementation Of EO-2

The Government began enforcing the non-enjoined portions of EO-2 on June 29, 2017 at 8:00 p.m. EDT. In doing so, the Government published guidance to its agencies on the implementation and enforcement of EO-2, guidance that has been amended, and which the Government has indicated will be amended again, as circumstances warrant. *See* Katyal Decl., Exs. A–C, & F, ECF Nos. 329-1, 329-2, 329-3, & 329-6.

The Government's guidance defines "close familial relationship" as including a parent, parent-in-law, spouse, fiancé, child, adult son or daughter, son-in-law, daughter-in-law, sibling (whether whole or half), and step relationships. These relationships are exempt from EO-2. The Government's definition does not include grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law.[2] Plaintiffs challenge the Government's narrower construction.

---

[2]The Government's first official guidance published on June 29, 2017, before enforcement of Sections 2(c), 6(a), and 6(b), indicated that fiancés would not be considered to be close family members for purposes of applying the Supreme Court's decision. That guidance was

With respect to refugee program guidance, the Government instructed agencies that, "[t]he fact that a resettlement agency in the United States has provided a formal assurance for a refugee seeking admission . . . is not sufficient in and of itself to establish a qualifying relationship for that refugee with an entity in the United States." Katyal Decl., Ex. B, Dep't of State, *untitled guidance document* (received by Pls. June 29, 2017), ECF No. 329-2. The Government also initially indicated that it had not determined whether refugees with a "bona fide relationship with a person or entity in the United States" would be permitted to travel after July 6, 2017, and would issue further guidance. *See id.* Updated guidance from the State Department instructs its private voluntary agency partners that "[n]o new [advanced booking notifications ('ABNs')] for travel for cases with or without the required bona fide relationship to a person or entity in the United States may be requested at this time. We hope to allow new ABNs for such cases to resume in the very near future, once we clarify verification procedures." Katyal Decl., Ex. F, E-mail from Lawrence E. Bartlett, Dir., Office of Admissions, Bureau of Population, Refugees, & Migration, to Voluntary Agencies (July 3, 2017, 16:30 EDT), ECF No. 329-6. Plaintiffs contest this guidance, principally asserting that refugees with a formal

---

subsequently updated to include fiancés. *See* Katyal Decl., Ex. C, Dep't of State, *Exec. Order on Visas*, at 3 (June 29, 2017), ECF No. 329-3, *available at* https://travel.state.gov/content/travel/en/news/important-annoucement.html.

assurance can credibly claim a bona fide relationship with a refugee resettlement agency.

Plaintiffs additionally request that the Court recognize that certain client relationships with legal services organizations are protected by this Court's injunction, and that the participants in three specific refugee programs are categorically exempt from EO-2: "U.S.-affiliated Iraqis" at risk of persecution because of their contributions to the United States' combat mission in Iraq; participants in the Central American Minors Program; and participants in the Lautenberg Program, each of which, Plaintiffs argue, requires participants to have close family ties with the United States, a relationship with a "designated resettlement agency," or both. Plaintiffs ask the Court to issue an order either enforcing or modifying its amended preliminary injunction to reflect the scope of relief requested in the Motion.[3]

---

[3]Plaintiffs request that the Court issue an order enforcing or modifying its preliminary injunction to reflect that

> (1) the injunction bars the Government from implementing the Executive Order against grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States; (2) the injunction prohibits the Government from applying sections 6(a) and 6(b) to exclude refugees who: (i) have a formal assurance from a resettlement agency within the United States (ii) have a bona fide client relationship with a U.S. legal services organization; or (iii) are in the U.S. Refugee Admissions Program ("USRAP") through the Iraqi Direct Access Program for "U.S.-affiliated Iraqis," the Central American Minors Program, or the Lautenberg Program; (3) the injunction bars defendants

DISCUSSION

I. Legal Standard

Federal Rule of Civil Procedure 62(c) allows this Court to issue further orders with respect to an injunction it issued, notwithstanding appeal, in order to preserve the status quo or ensure compliance with its earlier orders. *See Nat. Res. Def Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001).[4] Pursuant to Rule 62(c), "[t]he court may modify or broaden the scope of its injunction under its continuing duty to supervise the relief granted if it is informed of new facts that require additional supervisory action."[5] *Nat'l Grange of the Order of Patrons of*

> from suspending any part of the refugee admission process, including any part of the "Advanced Booking" process, for individuals with a bona fide relationship with a U.S. person or entity; and (4) the preliminary injunction prohibits the Government from applying a presumption that an applicant lacks "a bona fide relationship with a person or entity in the United States."

Mot. 1–2.

[4]*See also Hoffman for & on Behalf of N.L.R.B. v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976) (addressing situations in which a district court "has a continuing duty to maintain a status quo" and stating, "[w]e believe the rule should be, and we so hold that, in the kinds of cases where the court supervises a continuing course of conduct and where as new facts develop additional supervisory action by the court is required, an appeal from the supervisory order does not divest the district court of jurisdiction to continue its supervision, even though in the course of that supervision the court acts upon or modifies the order from which the appeal is taken"). The current status quo pending appeal is the preliminary injunction which enjoins defendants from enforcing portions of EO-2, as modified by the Supreme Court's June 26, 2017 order.

[5]*See also Toussaint v. McCarthy*, 801 F.2d 1080, 1090 (9th Cir. 1986) ("A change in the law may constitute a changing circumstance requiring the modification of an injunction. An intervening judicial opinion may require modification of an injunction."), *overruled in part on other grounds by Sandin v Conner*, 515 U.S. 472 (1995).

Husbandry v. Cal. State Grange, 182 F. Supp. 3d 1065, 1074 (E.D. Cal. 2016) (citing, *inter alia*, *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647–48 (1961) (holding that a district court has "wide discretion" to modify an injunction based on changed circumstances or new facts); *A & M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098–99 (9th Cir. 2002) (modification of injunction during pendency of appeal was proper to clarify the injunction and supervise compliance in light of new facts)).[6]

This Court is guided by the Supreme Court's instruction that "[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." Slip. Op. at 9 (citations omitted).

---

[6]Plaintiffs initially moved this Court to clarify the scope of the injunction, in light of the Supreme Court's June 26, 2017 modification (ECF. No. 293), a motion which the Court denied without reaching the merits. *See Hawaii v. Trump*, --- F. Supp. 3d ----, 2017 WL 2882696 (D. Haw. July 6, 2017). On July 7, 2017, the Ninth Circuit dismissed Plaintiffs' appeal of that decision and denied as moot their motion for an injunction pending appeal. *See Hawaii v. Trump*, No. 17-16366, slip op. at 3 (9th Cir. July 7, 2017), ECF No. 3. The Ninth Circuit explained that although this Court does "not have authority to *clarify* an order of the Supreme Court, it does possess the ability to interpret and enforce the Supreme Court's order, as well as the authority to enjoin against, for example, a party's violation of the Supreme Court's order placing effective limitations on the scope of the district court's preliminary injunction." *Id.* Because Plaintiffs now seek such injunctive relief, the Court reaches the merits of their request, consistent with the Ninth Circuit's guidance. *See id.* ("Plaintiff's motion before the district court was clear: it sought clarification of the Supreme Court's June 26 order, not injunctive relief. Because the district court was not asked to grant injunctive relief or to modify the injunction, we do no fault it for not doing so.").

With this framework in mind, the Court turns to Plaintiffs' specific requests for injunctive relief.

II. The Government's Implementation Of The Supreme Court's "Close Familial Relationship" Standard Is Unduly Restrictive

Plaintiffs request that the Court enjoin the Government from implementing EO-2 against grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States. The Supreme Court held that foreign nationals who claim a bona fide relationship with a person in the United States must have a "close familial relationship" in order to be excluded from the effects of EO-2, but the Supreme Court did not comprehensively define that phrase. Slip Op. at 12. The Government, in an effort to provide consular officials and agencies with the necessary guidance to implement the standard in a very short window of time, created a list of family relations it claims satisfies the standard. The Government's list includes only parents, parents-in-law, spouses, fiancés, children, adult sons or daughters, sons-in-law, daughters-in-law, siblings (whether whole or half), and step relationships, principally in reliance on certain provisions within the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101 *et seq.*,

applicable to family-based immigrant visas. *See, e g* , 8 U.S.C. §§ 1101(b)(1)–(2); 1151(b)(2); 1153(a); 1184(d).[7]

In its June 26, 2017 decision, the Supreme Court identified illustrative, but not exhaustive, examples of "close familial relationships." A spouse and a mother-in-law "clearly" qualify, but which other relationships meet this standard is less clear. *See* Slip Op. at 12. What is clear from the Supreme Court's decision is that this Court's analysis is to be guided by consideration of whether foreign nationals have a requisite "connection" or "tie" to this country. *See* Slip Op. at 11 (holding that the injunction is not to be enforced against foreign nationals with "no connection to the United States at all," those who "lack[] any connection to this country," and "when there is no tie between the foreign national and the United States."). Put another way, context matters. And when appropriately considered in the context of the June 26 order, the Government's narrowly defined list finds no support in the careful language of the Supreme Court or even in the immigration statutes on which the Government relies.

First, the Government's utilization of the specific, family-based visa provisions of the INA identified above constitutes cherry-picking and resulted in a

---

[7]The Government contends that, to the extent it also relies on INA provisions that govern the "allocation of a numerically-limited number of visas . [,] all of these provisions draw lines in the context of determining which familial relationships are close enough to petition for a visa under the INA. That is exactly the type of line-drawing that the Supreme Court's opinion requires." Mem. in Opp'n 5 n 2 (citation omitted).

predetermined and unduly restrictive reading of "close familial relationship." Other, equally relevant federal immigration statutes define a close family in a much broader manner. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 297, 310 (1993) (including "aunts, uncles, [and] grandparents" as among "close blood relatives") (quoting 8 C.F.R. § 242.24 (1992), recodified at 8 C.F.R. § 236.3(b)(1)(iii)); *see also* Fam. Sponsor Immigration Act of 2002, Pub. L. 107-150, § 2(a) (entitled "Permitting Substitution of Alternative Close Family Sponsor In Case of Death of Petitioner," and amending 8 U.S.C. § 1183a(f) to allow sisters-in-law, brothers-in-law, grandparents, and grandchildren to sponsor aliens for admission).[8]

Second, Defendants point to nothing in the Supreme Court's order that supports their truncated reading. In fact, the Supreme Court specifically included a mother-in-law within its definition of "close family" despite the exclusion of mothers-in-law from the statutes relied upon by the Government in crafting its guidance. The Supreme Court was clear that EO-2 may not be enforced against Dr. Elshikh's mother-in-law, not because she is merely the mother of his wife, but because she "clearly has such a [close familial] relationship" with Dr. Elshikh

---

[8]Plaintiffs additionally identify other immigration laws that enable an individual to seek admission on behalf of "[g]randchild(ren)" and "[n]iece[s] or nephew[s]," 81 Fed. Reg. 92,266, 92,280 (Dec. 19, 2016); to apply for asylum if a "grandparent, grandchild, aunt, uncle, niece, or nephew" resides in the United States, 69 Fed. Reg. 69,480, 69,488 (Nov. 29, 2004); to apply for naturalization on behalf of a grandchild, 8 U.S.C. § 1433(a); and to qualify as a special immigrant if he is the "grandparent" of a person in the United States, *see* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 421(b)(3) (2001).

himself. Slip. Op. at 12. Had the Supreme Court intended to protect only immediate family members and parents-in-law, surely it could have said so. It did not.

Indeed, Supreme Court case law drawn from other contexts supports a broader definition of "close familial relationship" than that urged by the Government. *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (holding that the invalidation of a local housing ordinance was warranted, in part, because the "tradition of uncles, aunts, cousins, and especially grandparents sharing a household with parents and children has roots equally venerable and equally deserving of constitutional recognition"); *Troxel v. Granville*, 530 U.S. 57, 63–65 (2000) (plurality opinion) ("[D]emographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. . . . In many cases, grandparents play an important role.").[9]

In sum, the Government's definition of "close familial relationship" is not only not compelled by the Supreme Court's June 26 decision, but contradicts it.

---

[9]*See also Caldwell v. Brown*, No. C09-1332RSL, 2010 WL 3501839, at *2 (W.D. Wash. Sept. 3, 2010) ("[T]he grandparent-grandchild relationship is entitled to respect and some level of recognition in our society. As the United States Supreme Court has recognized, grandparents often play an 'important role' in the lives of their grandchildren. . . . The question is not whether grandparents are important members of the American family: they are." (quoting *Troxel*, 530 U.S. at 64)).

Equally problematic, the Government's definition represents the antithesis of common sense. Common sense, for instance, dictates that close family members be defined to include grandparents. Indeed, grandparents are the *epitome* of close family members. The Government's definition excludes them. That simply cannot be. *See generally Klayman v. Obama*, 142 F. Supp. 3d 172, 188 (D.D.C. 2015) (noting that courts should not "abandon all common sense" when considering injunctive relief).[10]

In light of the careful balancing of the hardships and the equitable considerations mandated by the Supreme Court, the Court finds that Plaintiffs have met their burden of establishing that the specific requested injunctive relief related to EO-2 is necessary to preserve the status quo pending appeal. Plaintiffs' Motion is accordingly granted with respect to this issue, and the Court will modify the injunction in the manner requested.

III. The Government May Not Exclude Refugees With A Credible Claim Of A Bona Fide Relationship With A Person Or Entity In The United States

Plaintiffs ask the Court to modify the injunction with respect to Sections 6(a) and 6(b) in several respects, each of which is addressed in turn.

---

[10]Although the Government contends that its "reasonable construction" is entitled to deference (*see* Mem. in Opp'n 9), it offers no authority in support of that proposition.

A. The Government May Not Exclude Refugees Covered By a Formal Assurance Between The Government And A United States Refugee Resettlement Agency

Plaintiffs seek to prevent the Government from implementing agency guidance that "[t]he fact that a resettlement agency in the United States has provided a formal assurance for a refugee seeking admission . . . is not sufficient in and of itself to establish a qualifying relationship for the refugee with an entity in the United States." Katyal Decl., Ex. B, Dep't of State, *untitled guidance document* (received by Pls. June 29, 2017), ECF No. 329-1. Plaintiffs insist that a formal assurance issued by a resettlement agency satisfies the Supreme Court's bona fide relationship requirement due to the formal nature of the agreement and the extensive obligations it triggers on the part of the voluntary agency or affiliate.

The parties do not dispute that before *any* refugee is admitted to the United States under the USRAP, the Department of State must receive a commitment ("assurance") from a resettlement agency. *See* Mem. in Opp'n to Emergency Mot. to Clarify, Bartlett Decl. ¶¶ 14–19; ECF No. 301-1; *see id* ¶ 16 ("All refugees receive a sponsorship assurance from a resettlement agency before they travel to the United States."). Once a particular refugee has been approved by the Department of Homeland Security and provides a satisfactory medical evaluation, the refugee is assigned to one of several Government-contracted resettlement agencies, which then submits an assurance agreeing to provide basic, required services if and when the

refugee arrives in the United States. Bartlett Decl. ¶¶ 19–21, ECF No. 301-1. The Government quarrels with the effect of such an assurance. According to the Government, because the assurance is an agreement between the State Department and a resettlement agency, not an agreement between a resettlement agency and the refugee who benefits from the assurance, the assurance cannot evidence the type of bona fide relationship contemplated by the Supreme Court. Mem. in Opp'n 11. The Court disagrees.

Nothing in the Supreme Court's decision requires a refugee to enter into a contract with a United States entity in order to demonstrate the type of formal relationship necessary to avoid the effects of EO-2. An assurance from a United States refugee resettlement agency, in fact, meets each of the Supreme Court's touchstones: it is formal, it is a documented contract, it is binding, it triggers responsibilities and obligations, including compensation, it is issued specific to an individual refugee only when that refugee has been approved for entry by the Department of Homeland Security, and it is issued in the ordinary course, and historically has been for decades. *See* Slip Op. at 12. Bona fide does not get any more bona fide than that.[11] Accordingly, Plaintiffs' Motion is granted with respect to this specific request for injunctive relief.[12]

---

[11]Even if the Government is correct that the resettlement agency providing an assurance typically does not have "direct contact" with the refugee prior to his or her arrival, no such "direct contact"

B. No Modification With Respect To Legal Services Organizations Is Warranted

Plaintiffs request that the Court modify its injunction to specify that the Government is prohibited from applying Sections 6(a) and 6(b) to exclude refugees who have a bona fide client relationship with a United States legal services organization.

The Government previously noted that there currently is no applicable guidance regarding the treatment of legal services providers because the nature of such representational services varies significantly. *See* Mem. in Opp'n to

---

is required anywhere in the Supreme Court's decision. Moreover, the resettlement agency's binding commitments arise when the agency provides a formal sponsorship assurance. *See* Bartlett Decl. ¶¶ 20–21, ECF No. 301-1, *see also* Suppl. Hetfield Decl. ¶¶ 4–5, ECF No. 336-3 The resettlement agency suffers a "concrete injury" in the form of lost resources when resettlement is thwarted by the very Government that approved that refugee's admission. *See Exodus Refugee Immigration, Inc v Pence*, 165 F Supp. 3d 718, 729, 731-732 (S.D. Ind.), *aff'd* 838 F 3d 902 (7th Cir. 2016); *see also Exodus Refugee Immigration, Inc v Pence*, No. 1 15-cv-01858-TWP-DKL, 2016 WL 1222265, at *5 (S D. Ind. Mar. 29, 2016) (denying stay pending appeal pursuant to Rule 62(c), based, in part, on finding that the "State's conduct harms [the resettlement agency by] requir[ing] it to shift its resources to make up for the funding it will lose, [which] will have a detrimental effect on its Syrian and non-Syrian clients' resettlement and transition to life in the United States"), *aff'd* 838 F 3d 902 (7th Cir. 2016). A relationship that results in such concrete hardship to a United States entity is precisely the circumstance that the Supreme Court has found to be deserving of exclusion from the effects of EO-2. *See* Slip Op. at 13.

[12]Plaintiffs complain of travel procedures and booking dates that they assert the Government is using to flout this Court's injunction. *See, e g* , Suppl. Hetfield Decl ¶¶ 4–5 & Ex A (E-mail from Lawrence E. Bartlett, to Voluntary Agencies (July 8, 2017, 8:05 EDT)), ECF No. 336-3. As best the Court can discern, regardless of the booking date involved, these complaints all relate to refugees with formal assurances, who the Court has now determined have the requisite bona fide relationship contemplated by the Supreme Court, and who are therefore excluded from the application of EO-2. No further relief covering these refugees appears to be necessary, and the Court denies any such request as moot If this ruling and the related injunction modifications set forth in this Order do not resolve or do not address Plaintiffs' travel procedure concerns, an application offering further detail may be filed.

Emergency Mot. to Clarify Prelim Inj. 20–21, ECF No. 301. The Court agrees. Plaintiffs, for instance, advocate that foreign nationals consulting abroad with "affiliates" of American legal services providers regarding United States immigration law qualify as having a credible claim of a bona fide relationship with a person or entity in the United States. That conclusion, while conceivable, appears to be nearly impossible to reach absent additional facts, such as with respect to the nature of the consultation and affiliation. A categorical exemption of the sort requested would run afoul of the Supreme Court's order, which provides at least one example of when such a legal services client relationship would not be protected. *See* Slip Op. at 12.

Accordingly, to the extent Plaintiffs seek injunctive relief on behalf of IRAP and similar legal services providers, they fail to meet their burden, and the Court declines to issue the categorical modification sought.

C. Categorical Modifications Relating To U.S.-Affiliated Iraqis, The Central American Minors Program, And The Lautenberg Program

Plaintiffs, joined by amici IRAP and HIAS, ask that the Court enforce or modify the injunction due to the Government's alleged refusal to recognize particular refugees who have the requisite relationship to a United States entity or close family member contemplated by the Supreme Court. More specifically, Plaintiffs seek relief on behalf of refugees who accessed the USRAP through the

Iraqi Direct Access Program for U.S.-Affiliated Iraqis, the Central American Minors Program, and the Lautenberg Program. *See* Br. of IRAP *et al.* as Amici Curiae in Supp. of Pls.' Mot. 10–13, ECF No. 339.

1. **Direct Access Program For U.S.-Affiliated Iraqis**

Plaintiffs contend that refugee applicants in the Iraqi Direct Access Program for U.S.-Affiliated Iraqis are categorically exempt from Sections 6(a) and 6(b) because they necessarily have the requisite bona fide relationship with a United States person or entity. *See* Mem. in Supp. of Mot. 15 n.6; *see also* Br. of IRAP *et al.* as Amici Curiae in Supp. of Pls.' Mot. 11–12; Allen Decl. ¶¶ 17–24, ECF No. 336-5 (describing mechanics and goals of program). Under the program, Iraqis who believe they are at risk or have experienced serious harm as a result of associating with the United States Government since March 20, 2003 may apply directly for resettlement as refugees in the United States, upon "verifiable proof of U.S.-affiliated employment." *See* Dep't of State, Bureau of Population, Refugees, & Migration, *Fact Sheet: U.S. Refugee Admissions Program (USRAP) Direct Access Program for U.S.-Affiliated Iraqis* (Mar. 11, 2016), *available at* https://www.state.gov/j/prm/releases/factsheets/2016/254650.htm ("The following individuals and their derivatives (spouse and unmarried children under age 21), with verifiable proof of U.S.-affiliated employment, may seek access through this program: 1. Iraqis who work/worked on a full-time basis as interpreters/translators

for the U.S. Government (USG) or Multi-National Forces (MNF-I) in Iraq; 2. Iraqis who are/were employed by the USG in Iraq[.]"). Program applicants need not be current employees of the United States or a United States-affiliated entity.

The Government opposes this request because the "Iraqi Direct Access Program includes certain nonqualifying relationships with the U.S. Government itself, as well as past (not current) relationships." Mem. in Opp'n 15 n.6. The Court concurs. Although U.S-Affiliated Iraqis with verifiable past employment relationships with United States entities may qualify for participation in the program, these applicants are not necessarily exempt from EO-2. The Supreme Court's guidance, as it relates to Section 6, clearly contemplates relationships that are current and existing. That does not necessarily follow with respect to certain Iraqi Direct Access Program applicants.

Accordingly, on the record before the Court, categorical relief is not appropriate, and Plaintiffs' Motion is denied with respect to the Iraqi Direct Access Program for U.S.-Affiliated Iraqis.

2. Central American Minors Program

The Central American Minors ("CAM") program "protects Central Americans at risk by allowing lawfully present parents in the United States to request refugee status for their children in El Salvador, Honduras, and Guatemala via the U.S. Refugee Admissions Program." *See* Dep't of State, *Cent. Am. Minors*

Program (Nov. 2014), *available at* https://www.state.gov/j/prm/ra/cam/index.htm. The Government argues that because the program also allows "caregivers" who are merely "related to" the in-country parent or qualifying child to apply to the program, these participants do not necessarily have a sufficiently close relationship to a United States-based parent to qualify as a "close family member." *See* Mem in Opp'n 15 n.6; *see also* Dep't of State, *Worldwide Refugee Admissions Processing System (WRAPS), CAM Frequently Asked Questions* (Nov. 2016), *available at* https://www.wrapsnet.org/s/CAM-Frequently-Asked-Questions-November-2016.docx.

While it appears that most of those eligible to participate in the program (*e g* , minors with parents lawfully in the United States) would fall within those excluded from EO-2, that is not categorically true for all of those in the program. Because caregivers need not have the requisite "close familial relationship" to the in-country parent, program-wide relief is not appropriate. Consequently, Plaintiffs' Motion is denied with respect to refugees who are in the USRAP through the CAM Program.

3. Lautenberg Program

The Lautenberg Program permits certain nationals of the former Soviet Union and other countries with "close family in the United States" to apply for refugee status. *See* Dep't of State, *Proposed Refugee Admissions for Fiscal Year 2017* (Sept 15, 2016), *available at*

https://www.state.gov/j/prm/releases/docsforcongress/261956.htm ("This Priority 2 designation applies to Jews, Evangelical Christians, and Ukrainian Catholic and Orthodox religious adherents identified in the Lautenberg Amendment, Public Law No. 101-167, § 599D, 103 Stat. 1261 (1989) (codified at 8 U.S.C. § 1157) as amended ('Lautenberg Amendment'), with close family in the United States.").

The Government opposes Plaintiffs' request for categorical relief with respect to the Lautenberg Program solely because the program includes grandparents and grandchildren as "close family." *See* Mem. in Opp'n 15 n.6 ("The Lautenberg Program . . . includes grandparents and grandchildren in the family relationship criteria for applicants."); *see also* Suppl. Hetfield Decl. ¶ 6, ECF No. 336-3. In light of the Court's determination that grandparents and grandchildren are within the penumbra of "close family" for purposes of the Supreme Court's June 26 decision, the Court rejects the Government's position with respect to the Lautenberg Program. That is, because all participants admitted through the Lautenberg Program, including grandparents and grandchildren, *must* have a "close familial relationship" as that term is used in the Supreme Court's stay order, the categorical relief requested by Plaintiffs is appropriate. As a result, Plaintiffs' Motion is granted with respect to refugees who are in the USRAP through the Lautenberg Program.

IV. No Modification Is Warranted With Respect To The Government's Alleged Use Of A "Presumption"

In their Motion, Plaintiffs request modification of the injunction to prevent the Government from applying a so-called presumption that an applicant lacks the requisite bona fide relationship identified by the Supreme Court. However, Plaintiffs present no substantive argument or authority in support of their request. *See* Mot. 2, ECF No. 328; Mem. in Supp. of Mot., ECF No. 328-1. In fact, even in the face of the Government's opposition, which correctly noted that Plaintiffs appear to have abandoned their presumption contention (*see* Mem. in Opp'n 2 n.1), Plaintiffs' reply brief remained silent (*see generally* Reply, ECF No. 342).

The Court accordingly finds that Plaintiffs have abandoned their presumption argument, notwithstanding the relief sought in their proposed orders. Because Plaintiffs present no discussion or authority in support of this request, there is no basis to award the injunctive relief sought, and the Motion is denied.

CONCLUSION

Based on the foregoing, Plaintiffs' Motion is GRANTED IN PART and DENIED IN PART. The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this order be filed.

The Court MODIFIES the preliminary injunction entered on March 29, 2017, amended on June 19, 2017, and partially stayed by a June 26, 2017 decision of the United States Supreme Court, to provide as follows:

PRELIMINARY INJUNCTION

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendants JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of Executive Order No. 13,780 across the Nation—except for those portions of Sections 2 and 6 providing for internal review procedures that do not burden individuals outside of the executive branch of the federal government. Enforcement of the enjoined provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

Defendants JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them are enjoined fully from the following:

1. Applying section 2(c), 6(a) and 6(b) of Executive Order 13,780 to exclude grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States.

2. Applying Section 6(a) and 6(b) of Executive Order 13,780 to exclude refugees who: (i) have a formal assurance from an agency within the United States that the agency will provide, or ensure the provision of, reception and placement services to that refugee; or (ii) are in the U.S. Refugee Admissions Program through the Lautenberg Program.

IT IS SO ORDERED.

Dated: July 13, 2017 at Honolulu, Hawai'i.

UNITED STATES DISTRICT COURT DISTRICT OF HAWAII

Derrick K. Watson
United States District Judge

FILE COPY

Supreme Court, U.S.
FILED
JUL 18 2017
OFFICE OF THE CLERK

No. 16-1540 (16A-1191)

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Applicants,

v.

STATE OF HAWAII, *et al.*,
Respondents.

RESPONSE TO MOTION FOR CLARIFICATION OF STAY RULING AND APPLICATION FOR TEMPORARY ADMINISTRATIVE STAY OF MODIFIED INJUNCTION

DOUGLAS S. CHIN
Attorney General of the State of Hawaii
CLYDE J. WADSWORTH
Solicitor General of the State of Hawaii
DEIRDRE MARIE-IHA
DONNA H. KALAMA
KIMBERLY T. GUIDRY
ROBERT T. NAKATSUJI
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL,
STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

Counsel for the State of Hawaii

NEAL KUMAR KATYAL*
COLLEEN ROH SINZDAK
MITCHELL P. REICH
ELIZABETH HAGERTY
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com
**Counsel of Record*

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

SARA SOLOW
ALEXANDER B. BOWERMAN
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103

Counsel for Respondents

July 18, 2017

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 3

ARGUMENT 9

I. THE GOVERNMENT'S MYRIAD REQUESTS FOR RELIEF ARE PROCEDURALLY IMPROPER 8

II. THE GOVERNMENT'S GUIDANCE FLOUTS THIS COURT'S ORDER 16

A. Refugees With Formal Assurances Remain Covered By The Injunction 18

B. The District Court Correctly Held That This Court's Order Protects Grandchildren, Nieces, And Other Close Relatives Of Persons In The United States 27

III. THIS COURT SHOULD NOT STAY THE DISTRICT COURT'S ORDER MODIFYING THE INJUNCTION 35

CONCLUSION 38

TABLE OF AUTHORITIES

Page(s)

CASES:

Aaron v. *Cooper*,
357 U.S. 566 (1958) 13

Allied Chem. Corp. v. *Daiflon, Inc.*,
449 U.S. 33 (1980) 15

Arkansas Louisiana Gas Co. v. *Hall*,
454 U.S. 809 (1981) 10

Aro Mfg. Co. v. *Convertible Top Replacement Co.*,
365 U.S. 890 (1961) 10

Bank of America Corp. v. *City of Miami*,
137 S. Ct. 1296 (2017) 11

Boston & Providence R.R. Corp. Stockholders v. *N.Y., New Haven & Hartford R.R. Co.*, 350 U.S. 985 (1956) 10

Brown v. *Plata*,
563 U.S. 493 (2011) 11

Brown v. *Thomson*,
435 U.S. 993 (1978) 10

Cheney v. *U.S. Dist. Court for D.C.*,
542 U.S. 367 (2004) 14, 15, 16

Chewning v. *Cunningham*,
371 U.S. 803 (1962) 10

Clinton v. *City of New York*,
534 U.S. 417 (1998) 20

Coleman v. *PACCAR, Inc.*,
424 U.S. 1301 (1976) 13

Coones v. *FDIC*,
506 U.S. 951 (1992) 10

Cutter v. *Wilkinson*,
544 U.S. 709 (2005) 10

Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. *Rasmussen*,
441 U.S. 930 (1979) 10

Doe v. *McMillan*,
419 U.S. 1043 (1974) 10

Douglas v. *Indep. Living Ctr. of S. Cal., Inc.*,
565 U.S. 606 (2012) 31

Dyer v. *Sec. & Exch. Comm'n*,
361 U.S. 803 (1959) 10

Erie R.R. Co. v. *Baltimore & Ohio R.R. Co.*,
356 U.S. 970 (1958) 10

F.W. Woolworth Co. v. *Contemporary Arts, Inc.*,
350 U.S. 810 (1955) 10

Fitzgerald v. *U.S. Lines Co.*,
376 U.S. 901 (1964) 10

Funicello v. *New Jersey*,
404 U.S. 876 (1971) 10

Geo Control & New Hampshire Ins. Co. v. *Rasmussen*,
441 U.S. 930 (1979) 10

Halderman v. *Pennhurst State Sch. & Hosp.*,
673 F.2d 628 (3d Cir. 1982) 12

Halderman v. *Pennhurst State Sch. & Hosp.*,
555 F. Supp. 1144 (E.D. Pa. 1983) 12

Harvey v. *Cunningham*,
371 U.S. 803 (1962) 10

Hazelwood Chronic & Convalescent Hosp., Inc. v. *Califano*,
434 U.S. 811 (1977) 10

In re Gomez,
2006 WL 2391225 (BIA July 6, 2006) 33

In re Mulholland,
2007 WL 2299644 (BIA July 12, 2007) 33

In re Pennhurst Parents-Staff Ass'n,
449 U.S. 1009 (1980) 12, 15

In re Tiffany,
252 U.S. 32 (1920) 15

INS v. *Hector*,
479 U.S. 85 (1986) 31

Kerr v. *U.S. Dist. Court for N. Dist. of Cal.*,
426 U.S. 394 (1976) 16

Klapprott v. *United States*,
336 U.S. 949 (1949) 10

Kleinschmidt v. *U.S. Fid. & Guar. Ins. Co.*,
509 U.S. 946 (1993) 10

Krause v. *Rhodes*,
434 U.S. 1335 (1977) 36

Little Sisters of the Poor Home for the Aged v. *Sebelius*,
134 S. Ct. 893 (2013) 37

Marr v. *A.B. Dick Co.*,
330 U.S. 810 (1947) 10

Marrese v. *Am. Acad. of Orthopaedic Surgeons*,
471 U.S. 1062 (1985) 10

Mathis v. *New Jersey*,
404 U.S. 876 (1971) 10

McBride v. *Toledo Terminal R.R. Co.*,
355 U.S. 910 (1958) 10

McComb v. *Jacksonville Paper Co.*,
336 U.S. 187 (1949) 35, 38

McLane Co., Inc. v. *EEOC*,
137 S. Ct. 1159 (2017) 10

Mercoid Corp. v. *Mid-Continent Inv. Co.*,
323 U.S. 672 (1944) 10

Michael H. v. *Gerald D.*,
504 U.S. 905 (1992) 10

Moore v. *City of E. Cleveland*,
431 U.S. 494 (1977) 27, 28

Nautilus, Inc. v. *Biosig Instruments, Inc.*,
134 S. Ct. 2120 (2014) 10

Nez Perce Tribe of Indians v. *United States*,
386 U.S. 1015 (1967) 10

NLRB v. *Int'l Bhd. of Elec. Workers, Local 340*,
481 U.S. 573 (1987) 35

N.Y. Cent. R.R. Co. v. *Baltimore & Ohio R.R. Co.*,
356 U.S. 970 (1958) 10

Overton v. *Bazzetta*,
539 U.S. 126 (2003) 29

Parr v. *United States*,
351 U.S. 513 (1956) 15

Pennhurst State Sch. & Hosp. v. *Halderman*,
448 U.S. 905 (1980) 11, 12

Prince v. Massachusetts,
321 U.S. 158 (1944) 29

Rees v. *Watertown*,
19 Wall. 107 (1874) 31

Regal Knitwear Co. v. *NLRB*,
324 U.S. 9 (1945) 38

Reno v. *Flores*,
507 U.S. 292 (1993) 29, 33

Schlagenhauf v. *Holder*,
379 U.S. 104 (1964) 15

Scialabba v. *Cuellar de Osorio*,
134 S. Ct. 2191 (2014) 31

Smith v. *Org. of Foster Families for Equality & Reform*,
431 U.S. 816. (1977) 29

Spears v. *United States*,
555 U.S. 261 (2009) 14

Spokeo Inc. v. *Robins*,
136 S. Ct. 1540 (2016) 18

State of Alabama v. *State of Texas*,
347 U.S. 950 (1954) 10

State of Rhode Island v. *State of Louisiana*,
347 U.S. 950 (1954) 10

State of Texas v. *State of New Jersey*,
381 U.S. 931 (1965) 10

Stewart v. *LaGrand*,
119 S. Ct. 1108 (1999) 10

Swenson v. *Stidham*,
410 U.S. 904 (1973) 9

Texas Health & Human Services Comm'n v. *United States*,
No. 3:15-cv-3851 (N.D. Tex. Jan. 5, 2016) 20

Trump v. *Int'l Refugee Assistance Project*,
137 S. Ct. 2080 (2017) ..... *passim*

United States v. *Paradise*,
480 U.S. 149 (1987) 13

Van Hook v. *United States*,
366 U.S. 915 (1961) 10

Vill. of Arlington Heights v. *Metro Hous. Dev. Corp.*,
429 U.S. 252 (1977) 20

Wearry v. *Cain*,
136 S. Ct. 1002 (2016) 14

Willner v. *Comm. on Character & Fitness*,
375 U.S. 950 (1963) 10

STATUTES:

8 U.S.C. § 1101(a)(15)(K) 34

8 U.S.C. § 1101(a)(15)(T)(ii)(III) 32

8 U.S.C. § 1151(b)(2)(A)(i) 34

8 U.S.C. § 1153(a) 31, 34

8 U.S.C. § 1182(a)(3)(D)(iv) 34

8 U.S.C. § 1183a(f)(5) 32

8 U.S.C. § 1184(d) 34

8 U.S.C. § 1254(a)(1) (1986) 31

8 U.S.C. § 1433(a) 32

28 U.S.C. § 1292(a) 6

Family Sponsor Immigration Act of 2002, Pub. L. No. 107-150 32

USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 421(b)(3) 32

RULES:

S. Ct. R. 10 13

REGULATIONS AND EXECUTIVE MATERIALS:

8 C.F.R. § 236.3(b)(1)(iii) 3

69 Fed. Reg. 69,480 (Nov. 29, 2004) 33

81 Fed. Reg. 92,266 (Dec. 19, 2016) 32

Executive Order 13,780 ..... *passim*

LEGISLATIVE MATERIAL:

H.R. Rep. 107-207 (2001) 32

OTHER AUTHORITIES:

11A Charles Alan Wright et al., Federal Practice & Procedure, Westlaw (3d ed., April 2017 Update) 38

Brief for the United States as Amicus Curiae, *Arab Bank* v. *Linde*, No. 12-1485 (U.S. May 23, 2014) 16

Brief for United States in Opposition to Petition for Certiorari, *Hamdan* v. *Rumsfeld*, No. 04-702 (U.S. 2004) 14

Stephen M. Shapiro et al., Supreme Court Practice 280 (10th ed. 2013) 14

Barbara J. Van Arsdale et al., Federal Procedure, Lawyers Edition, Westlaw (June 2017 Update) 36

INTRODUCTION

The Government asks this Court for emergency relief that is procedurally improper and substantively unnecessary. It seeks to leapfrog its own pending motion and appeal in the Ninth Circuit and obtain an expansion of the stay this Court issued just three weeks ago. And it contends this extraordinary relief is appropriate because the District Court's recent modification order has "eviscerated" this Court's stay.

That is nonsense. The District Court faithfully applied this Court's opinion, holding that "close relatives" like grandparents and nieces are permitted to enter, and recognizing that the charities, non-profits, and churches that have made a formal, contractual commitment to shelter and clothe refugees would suffer "concrete hardship" if those refugees are excluded. By the Government's own account, the District Court's order does not disturb the Government's authority to enforce Executive Order 13,780 ("EO-2") against more than 85% of refugees, or to exclude countless extended family members—second cousins, great aunts, and so forth—and other individuals who indisputably lack close relationships with American individuals and entities.

The Government's complaint boils down to the belief that any interpretation that meaningfully diminishes the practical consequence of its bans must be wrong. But the lower courts and this Court explicitly sought to minimize these practical consequences to the extent they inflict concrete harms on American individuals and entities. That is appropriate with respect to an Executive Order that has been

adjudged unlawful by both Courts of Appeals to consider it, and that would otherwise effect a dramatic departure from the immigration status quo that has existed for decades.

The Government attempts to sweep this aside, carefully avoiding any mention of the wider context of its motion. But that context matters. Plaintiffs have alleged that the enjoined order violates the fundamental constitutional guarantee of freedom of religion, as well as basic tenets of the immigration laws. They have argued that EO-2 must be enjoined in order to prevent concrete harms, such as the perpetuation of the separation of Dr. Elshikh's children from their grandmother and the disruption to the State of Hawaii's refugee resettlement programs, educational institutions, and tourism industry. They have further asserted that the injunction is necessary to protect the citizens of Hawaii and the American public in general from the profound infringement on religious freedom that occurs when the Government inflicts these concrete hardships as part of a policy that establishes a disfavored religion.

The Court has not reached the merits of those allegations. It will do so in October. In the interim, it is well settled that the Government is entitled to a stay only to the extent that the equities favor it. And this Court has already settled that the equities in this case tip in the Government's favor only when an excluded foreign national lacks a bona fide relationship with an individual or entity in the United States.

In the decision below, the District Court carefully applied that instruction, accepting some of Plaintiffs' claims and rejecting others. In doing so, it protected American individuals and entities from the real harms that occur when a close relative is excluded from this country, or when a refugee family that a community has prepared to welcome is not permitted to enter after all.

There is no reason for this Court to take the extraordinary step of granting a stay, certiorari before judgment, or mandamus relief. The District Court's opinion is correct. And, in any event, the Ninth Circuit—where the Government has filed an almost identical set of requests—is fully capable of fulfilling its normal role as the first line of appellate review. The Government's motion should be denied.

BACKGROUND

1. On June 26, 2017, this Court issued an order that stayed in part the District Court's injunction of Sections 2(c) and 6 of EO-2. This Court approved of the manner in which the District Court had "balance[d] the equities" with respect to U.S. persons "who have relationships with foreign nationals abroad, and whose rights might be affected if those foreign nationals were excluded." *Trump* v. *Int'l Refugee Assistance Project* ("*IRAP*"), 137 S. Ct. 2080, 2087 (2017). But the Court held that the equities "do not balance the same way" for aliens "who have no connection to the United States at all," and whose exclusion "does not burden any American party by reason of that party's relationship with the foreign national." *Id.* at 2088. Excluding such aliens, the Court explained, would "prevent the

Government from *** enforcing" EO-2 "without alleviating obvious hardship to anyone else." *Id.*

The Court therefore "narrow[ed] the scope of the injunctions." *Id.* It held that Section 2(c) "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Id.* For "individuals," it explained, "a close familial relationship is required," and foreign nationals "like Doe's wife or Dr. Elshikh's mother-in-law[] clearly ha[ve] such a relationship." *Id.* "As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO-2." *Id.* As examples of aliens with such relationships, the Court listed "students *** who have been admitted to the University of Hawaii," "worker[s] who accepted an offer of employment from an American company," and "lecturer[s] invited to address an American audience." *Id.* The Court explained that the same "equitable balance" applies to EO-2's refugee provisions, and thus prohibits the Government from invoking Sections 6(a) and 6(b) to bar refugees with whom "[a]n American individual or entity *** has a bona fide relationship," such that the American individual or entity "can legitimately claim concrete hardship if that [refugee] is excluded." *Id.* at 2089.

2. Shortly after this Court issued its stay order, Plaintiffs contacted the Government to try to reach agreement on the existing scope of the injunction. On the morning of June 27, Plaintiffs' counsel e-mailed the Government's attorneys and invited them to discuss the injunction's scope. The Government declined the

request, stating simply that it would make guidance publicly available before the travel and refugee bans went into effect. The following day, Plaintiffs in this case and in *Trump* v. *Int'l Refugee Assistance Project*, No. 16-1436, jointly presented the Government with a proposed list of foreign nationals protected by the Court's injunction, including refugees with a formal assurance from a resettlement agency, and grandchildren, nieces, and other close relatives of U.S. persons. Again the Government offered no response. On the morning and early afternoon of June 29—the day EO-2 was to go into effect—Plaintiffs asked the Government to confirm then-circulating reports that the Government intended to enforce EO-2 against refugees with formal assurances and grandparents and other close family members. The Government once again did not respond.

Finally, approximately three hours before the Government intended to begin enforcing EO-2, the Government's counsel sent Plaintiffs a copy of its publicly available guidance. This guidance made clear that the Government intended to carry out its unlawful plans as described in earlier reports. (It also provided that the Government would enforce the injunction against fiancés of U.S. persons—another violation—but the Government backtracked from that decision hours later.) In addition, the Government sent Plaintiffs a transcript of a teleconference it had earlier held with reporters, indicating that it had described its plans in detail to the press at the same time that it was refusing Plaintiffs' repeated requests for information about an injunction entered in their name.

3. At 7:00 PM on June 29, Plaintiffs filed a motion in the District Court to clarify the scope of its injunction as narrowed by this Court. Days later, the Government responded, addressing the merits of Plaintiffs' motion. *See* Gov't Br. in Opp. to Mot. to Clarify, D. Ct. Dkt. 301. Among other things, the Government justified its understanding of "close family" on the ground that the Immigration and Nationality Act (INA) "does not grant *any* immigration benefit for" grandparents, aunts, and the like, *id.* at 10 (emphasis added)—a representation it has since acknowledged is false, *see* Mot. 30 (now saying that "the INA does not provide *comparable* immigration benefits" for these relatives). The Government did not suggest that Plaintiffs' motion was procedurally improper, or that their request should have been filed directly in this Court.

Nonetheless, the District Court *sua sponte* held that it lacked authority to clarify the scope of this Court's order. Order Denying Plaintiffs' Mot. to Clarify Scope of Preliminary Injunction, D. Ct. Dkt. 322. Plaintiffs promptly appealed to the Ninth Circuit, seeking an emergency stay of the District Court's order. The Ninth Circuit dismissed the appeal under 28 U.S.C. § 1292(a) on the ground that it lacked jurisdiction to consider the denial of a motion to clarify. Order, *Hawaii* v. *Trump*, No. 17-16366 (9th Cir. July 7, 2017), ECF No. 3. The Court of Appeals explained, however, that even if the District Court were correct that it could not consider a motion to clarify its injunction in light of this Court's partial stay, it plainly did have authority to "interpret and enforce the Supreme Court's order" in

the context of a motion "to grant injunctive relief or to modify the injunction." *Id.* at 3.

Plaintiffs therefore returned to the District Court and filed a motion to enforce or, in the alternative, to modify the District Court's injunction. In their motion, Plaintiffs raised a number of claims: (1) that the Government's definition of "close familial relationship" was unlawful; (2) that refugees with a formal assurance from a refugee resettlement agency have a "bona fide relationship" with a U.S. entity; (3) that clients of legal services organizations necessarily have a "bona fide relationship" as well; and (4) that individuals in three specific refugee programs—the Direct Access Program for U.S.-Affiliated Iraqis, the Central American Minors Program, and the Lautenberg Program—are all categorically protected.

4. In a careful opinion, the District Court granted relief on some of Plaintiffs' claims and rejected others. The court concluded that the Government's definition of close family "finds no support in the careful language of the Supreme Court's opinion or even the immigration statutes on which the Government relies." Add. 12. It explained that the Government had "cherry-pick[ed]" favored provisions of the immigration laws, while ignoring others. *Id.* at 12-13. Moreover, the Government's interpretation was irreconcilable with this Court's holding that Dr. Elshikh's mother-in-law was "clearly" close family, and represented "the antithesis of common sense." *Id.* at 12-15. The District Court therefore modified its injunction to state that such relatives may not be excluded pursuant to EO-2. *Id.* at 15.

The court also concluded that a formal assurance from a resettlement agency necessarily establishes a "bona fide relationship" between a refugee and a U.S. entity. *Id.* at 17. The court explained that this relationship "meets each of the Supreme Court's touchstones: it is formal, it is a documented contract, it is binding, it triggers responsibilities and obligations, *** it is issued specific to an individual refugee *** , and it is issued in the ordinary course, and historically has been for decades." *Id.* at 17. The court also determined that refugees in the Lautenberg Program—which is limited to the "close family" of U.S. persons, including grandparents—are categorically protected by the injunction. *Id.* at 22-23. The court modified its injunction to reflect both of these conclusions, as well. *Id.* at 17, 23.

At the same time, the District Court agreed with the Government on several important issues. It held that a "categorical exemption" from the bans for foreign nationals with a client relationship with a legal services agency is inconsistent with this Court's opinion. *Id.* at 19. It also determined that neither the Direct Access Program for U.S.-Affiliated Iraqis nor the Central American Minors Program categorically requires a "bona fide relationship" with a U.S. person or entity. *Id* at 20-22. And it rejected a modification that Plaintiffs had initially proposed to clarify the procedures for implementing EO-2. *Id.* at 24.

5. The day after the District Court ruled, the Government filed a notice of appeal in the Ninth Circuit. It then filed the present motion in this Court, asking it to skip over the Ninth Circuit, stay the District Court's order, and issue various

forms of relief itself. Hours later, the Government filed yet another stay request in the Ninth Circuit, asking it to halt implementation of the District Court's modified injunction pending this Court's resolution of the various claims the Government has raised.

ARGUMENT

I. THE GOVERNMENT'S MYRIAD REQUESTS FOR RELIEF ARE PROCEDURALLY IMPROPER.

The Government requests three forms of relief from this Court: First, it asks the Court to "clarify" its opinion in *IRAP*; second, it asks the Court to grant certiorari before judgment and summarily vacate the District Court's modified injunction; and third, it asks for mandamus. Putting aside the weakness of the Government's contentions on the merits, each of these requests is procedurally improper and should be denied for that reason alone.

1. The Government's primary request is that the Court should "clarify the scope of [its] stay." Mot. 15. That request is truly extraordinary, and has no basis in this Court's settled procedures and practices. There is no Rule of this Court authorizing a motion to clarify. The Government (at 15-16) rests its request entirely on a single example: *Swenson* v. *Stidham*, 410 U.S. 904 (1973). To call that case a thin reed would be generous. *Swenson* was a two-sentence order modifying an opinion to correct a clerical error. *Id.* at 904. That isolated example is far afield from this case, where the Government asks the Court to elucidate and apply the substantive standard announced in a prior opinion. In general, when this Court has

been presented with requests for clarification—and particularly *substantive clarification*—they have been routinely and summarily denied.[1]

It is not hard to see why the Court (and the Solicitor General, in the past) has followed this practice: This is "a court of review, not first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718, n. 7 (2005). It frequently happens that the Court "announce[s]" a legal "standard," and then "remand[s]" the case to the lower courts to interpret and apply that standard. *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014); *see McLane Co., Inc.* v. *EEOC*, 137 S. Ct. 1159, 1167-68 (2017). That is because it is the lower courts that "should define, in the first

---

[1] *See, e.g.*, *Stewart* v. *LaGrand*, 119 S. Ct. 1108 (1999); *Kleinschmidt* v. *U.S. Fid. & Guar. Ins. Co.*, 509 U.S. 946 (1993); *Coones* v. *FDIC*, 506 U.S. 951 (1992); *Michael H.* v. *Gerald D.*, 504 U.S. 905 (1992); *Marrese* v. *Am. Acad. of Orthopaedic Surgeons*, 471 U.S. 1062 (1985); *Arkansas Louisiana Gas Co.* v. *Hall*, 454 U.S. 809 (1981); *Geo Control & New Hampshire Ins. Co.* v. *Rasmussen*, 441 U.S. 930 (1979); *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor* v. *Rasmussen*, 441 U.S. 930 (1979); *Brown* v. *Thomson*, 435 U.S. 993 (1978); *Hazelwood Chronic & Convalescent Hosp., Inc.* v. *Califano*, 434 U.S. 811 (1977); *Doe* v. *McMillan*, 419 U.S. 1043 (1974); *Funicello* v. *New Jersey*, 404 U.S. 876 (1971); *Mathis* v. *New Jersey*, 404 U.S. 876 (1971); *Nez Perce Tribe of Indians* v. *United States*, 386 U.S. 1015 (1967); *State of Texas* v. *State of New Jersey*, 381 U.S. 931 (1965); *Willner* v. *Comm. on Character & Fitness*, 375 U.S. 950 (1963); *Fitzgerald* v. *U.S. Lines Co.*, 376 U.S. 901 (1964); *Harvey* v. *Cunningham*, 371 U.S. 803 (1962); *Chewning* v. *Cunningham*, 371 U.S. 803 (1962); *Van Hook* v. *United States*, 366 U.S. 915 (1961); *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U.S. 890 (1961); *Dyer* v. *Sec. & Exch. Comm'n*, 361 U.S. 803 (1959); *Erie R.R. Co.* v. *Baltimore & Ohio R.R. Co.*, 356 U.S. 970 (1958); *N.Y. Cent. R.R. Co.* v. *Baltimore & Ohio R.R. Co.*, 356 U.S. 970 (1958); *McBride* v. *Toledo Terminal R R. Co.*, 355 U.S. 910 (1958); *Boston & Providence R.R. Corp. Stockholders* v. *N.Y., New Haven & Hartford R.R. Co.*, 350 U.S. 985 (1956); *F.W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 350 U.S. 810 (1955); *State of Rhode Island* v. *State of Louisiana*, 347 U.S. 950 (1954); *State of Alabama* v. *State of Texas*, 347 U.S. 950 (1954); *Klapprott* v. *United States*, 336 U.S. 949 (1949); *Marr* v. *A.B. Dick Co.*, 330 U.S. 810 (1947); *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 323 U.S. 672 (1944).

instance, the contours" of a standard and the lower courts that should "decide how that standard applies" to the facts of the particular case. *Bank of America Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1306 (2017). Entertaining freewheeling motions to "clarify" (or their procedural equivalents) would upset this settled principle and open the floodgates to litigants wishing for this Court to resolve ambiguities in its opinions prior to or during remand proceedings. It would also involve this Court in evidentiary determinations and fact finding to which it is ill-suited. *See Brown* v. *Plata*, 563 U.S. 493, 517 (2011) ("It is not this Court's place to duplicate the role of the trial court." (internal quotation marks omitted)). For example, in this case, both parties submitted affidavits and other evidence supporting their interpretations of the scope of the injunction. It is the lower courts and not this Court that are best equipped to evaluate these submissions in the first instance.[2]

The Government attempts (at 15) to excuse its procedurally improper request on the basis that "the dispute concerns the meaning and operative effect of this Court's own stay order." But this Court has previously rejected analogous relief in precisely the same context. In *Pennhurst State School & Hospital* v. *Halderman*, 448 U.S. 905 (1980), this Court partially stayed a district court injunction. *Id.* at 905-906. The district court then held a hearing to determine the application of the injunction in light of this Court's partial stay. Those defendants, like the

[2] It is notable that, when Plaintiffs filed their initial motion to clarify in the District Court, the Government never once suggested that it was procedurally improper, or that the motion should have been directed to this Court in the first instance. *See* D. Ct. Dkt. 301.

Government here, sought to bypass the traditional lower court process, filing a petition for mandamus asking this Court to correct the district court's interpretation of the stay while the merits appeal was pending. The Court, in a one sentence order, "declined to disturb [the district court's] interpretation and application of its stay order." *Halderman* v. *Pennhurst State Sch. & Hosp.*, 555 F. Supp 1144, 1147 (E.D. Pa. 1983); *see In re Pennhurst Parents-Staff Ass'n*, 449 U.S. 1009 (1980); *Halderman* v. *Pennhurst State Sch. & Hosp.*, 673 F.2d 628, 631 (3d Cir. 1982). There is no reason a different result should obtain here.

2. The Government also—"[o]ut of an abundance of caution"—asks this Court to construe its motion as a petition for a writ of certiorari before judgment, to grant certiorari, and to vacate the District Court's modified injunction. Mot. 17-18. The Court should deny that request for three reasons.

a. First, the present dispute does not warrant certiorari at all, let alone certiorari before judgment. This Court has already settled the relevant legal standard governing the petition—that the travel and refugee bans may be applied only to "foreign nationals who lack any bona fide relationship with a person or entity in the United States." 137 S. Ct. at 2087, 2089. The Government suggests (at 37) that the Court has "recogniz[ed] the important governmental interests at stake" in this dispute by granting certiorari in the underlying *merits* appeal, but there is an obvious difference between the resolution of an executive order's legality and the factbound administration of an injunction that this Court partially stayed just three weeks ago.

At bottom, the Government's present contention is simply that the District Court "misappli[ed] *** a properly stated rule of law" to two discrete classes of foreign nationals—refugees with formal assurances and some close relatives. S Ct. R. 10. That is a classic situation in which certiorari is unwarranted. *Id.* And certiorari is particularly inappropriate here in light of the broad latitude district courts are afforded to oversee and administer injunctions. After all, a district court is "best qualified to deal with the flinty, intractable realities of day-to-day implementation of constitutional commands." *United States* v. *Paradise*, 480 U.S. 149, 184 (1987) (internal quotation marks omitted); *see also id.* (explaining that a district court's "broad equitable powers mandate substantial respect" for its remedial "judgment").

b. Second, certiorari before judgment is "an extremely rare occurrence," *Coleman* v. *PACCAR, Inc*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers), and it is unwarranted here. The Ninth Circuit is perfectly capable of "recogniz[ing] the vital importance of the time element in this litigation" and acting quickly on any stay request and appeal. *Aaron* v. *Cooper*, 357 U.S. 566, 567 (1958) (denying certiorari before judgment). Moreover, the Government's insistence that it is necessary to bypass the Court of Appeals now is at odds with its own decision to eschew any immediate resort to this Court to challenge the District Court's injunction when it was much broader.[3]

[3] It is also at odds with the traditional position of the Solicitor General's Office. For example, the Office has opined that certiorari before judgment is inappropriate

c. Finally, the Government does not actually request plenary review; it asks only for vacatur on a summary basis. That even more exceptional relief is entirely unwarranted. Summary reversal and vacatur are generally reserved for cases where lower courts are not merely wrong, but "have egregiously misapplied settled law." *Wearry* v. *Cain*, 136 S. Ct. 1002, 1007 (2016) (per curiam); *see generally* Stephen M. Shapiro et al., Supreme Court Practice 280 (10th ed. 2013). As explained below, *see infra* pp. 16-35, the District Court's interpretation of this Court's stay is correct, and there is certainly no error that is "so apparent as to warrant the bitter medicine of summary reversal." *Spears* v. *United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting). Summary reversal is especially inappropriate in a certiorari before judgment posture; if the error is actually obvious enough to warrant summary reversal, it can be quickly corrected by the Court of Appeals without necessitating this Court's involvement.

3. Lastly, the Government asks for a writ of mandamus. That relief is also unwarranted.

a. First, a party seeking mandamus must "have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Cheney* v. *U.S. Dist. Court for*

---

when (1) "[t]his Court would * * * benefit from review by the court of appeals, which could provide helpful guidance" on the issues presented; (2) "consideration of the appeal by the" circuit court could "entirely obviate the need for this Court's review at this interlocutory stage"; and (3) there is no "previous appellate consideration of the questions presented." U.S. Brief in Opp. to Pet. for Certiorari at 10-11 & n.4, *Hamdan* v. *Rumsfeld*, No. 04-702 (U.S. 2004). All three of those considerations apply here.

D.C., 542 U.S. 367, 380-381 (2004) (internal quotation marks and citation omitted); *see In re Tiffany*, 252 U.S. 32, 37 (1920) ("It is well settled that where a party has the right to a writ of error or appeal, resort may not be had to the extraordinary writ of mandamus or prohibition."). Here, the Government is transparently seeking to use the writ "as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380-381. Indeed, there is an appeal currently pending in the Ninth Circuit presenting the precise question raised in the mandamus petition. The only reason the Government gives for why relief in the Ninth Circuit is inadequate is that "no lower court can conclusively determine the correct scope of a decision of this Court." Mot. 18. But that is true in every case; if that fact were enough to make relief in a lower court "inadequate" it would upend the settled rule that mandamus "is not to be used as a substitute for appeal, even though hardship may result from delay." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964) (citation omitted); *see also In re Pennhurst Parents-Staff Ass'n*, 449 U.S. at 1009 (denying petition for mandamus relief to clarify a partial stay by the Supreme Court).

b. Second, for mandamus to issue, the decision below must be more than just wrong. The "writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.'" *Schlagenhauf*, 379 U.S. at 112 (quoting *Parr* v. *United States*, 351 U.S. 513, 520 (1956)). Rather, mandamus is justified "[o]nly in exceptional circumstances, amounting to a judicial usurpation of power," *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980), where the "right to issuance of the writ is 'clear

and indisputable,'" *Cheney*, 542 U.S. at 381 (quoting *Kerr* v. *U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)). It is well settled that a district court has the right—and sometimes the *duty*—to modify its own injunction. *System Federation No. 91* v. *Wright*, 364 U.S. 642, 647 (1961). The District Court did not engage in a "judicial usurpation of power" by exercising that well-established authority to ensure that the Government complied with the terms of this Court's stay.[4]

II. THE GOVERNMENT'S GUIDANCE FLOUTS THIS COURT'S ORDER.

The District Court's decision was also plainly correct. This Court's order was clear: The Government may not apply Section 2(c) or Section 6(a) and (b) to exclude a foreign national "who ha[s] a credible claim of a bona fide relationship with a person or entity in the United States." *IRAP*, 137 S. Ct. at 2088. The Government may, however, apply EO-2 to those "who lack[] any connection to this country." *Id.*

This Court's rationale for its order was equally clear: In tailoring its stay, the Court "balance[d] the equities," giving proper consideration to "the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* at 2087 (internal quotation mark omitted). The Court observed that "prevent[ing] the Government from" enforcing EO-2 "against foreign nationals unconnected to the United States would appreciably injure [the Government's] interests, without alleviating obvious hardship to anyone else." *Id.* at 2088. On the other hand, when

---

[4] Again, the position of the Office of the Solicitor General here is inconsistent with the prior views of the Office. The District Court's order is not "obviously incorrect," which the Government itself has previously viewed as a prerequisite to mandamus review. Brief for the United States as *Amicus Curiae* at 8, *Arab Bank* v. *Linde*, No. 12-1485 (U.S. May 23, 2014).

an American party has a "bona fide relationship with a particular person seeking to enter the country," that American entity or individual can "legitimately claim concrete hardship if that person is excluded." *Id.* at 2089. Thus, the "balance tips in favor of the Government's" asserted interest in national security only when the foreign national "lack[s] any such connection to the United States." *Id.*

This Court also spoke clearly in specifying the types of connections that necessarily exempt a foreign national from the bans. A relationship between an American entity and a foreign national "must be formal, documented, and formed in the ordinary course." *Id.* at 2088. Such a connection will be similar to the one between an admitted student and an American university, a worker and her would-be American employer, or a lecturer and the American audience she is invited to address. *See id.* As for American individuals, their connection with a foreign national qualifies so long as it is a "close familial relationship" such as the one that a man has with his wife or his mother-in-law. *Id.*

The Government's implementation of the travel and refugee bans flouts these clear dictates. The relationship between a refugee and the resettlement agency that promises to prepare for her arrival is formal, documented, and formed in the ordinary course. Blocking the refugee's admission indisputably inflicts a "concrete hardship" on that resettlement agency and its local partners that is easily as severe as that inflicted by a university's inability to welcome an admitted student, or a group's inability to hear a desired lecturer. The same is true when the Government

bars the entry of a grandparent, grandchild, aunt, uncle, niece, nephew, sibling-in-law, or cousin.

Nor will permitting the entrance of these individuals "eviscerate" this Court's stay. Mot. 14. Just as this Court intended, the stay will continue to apply to *every* foreign national that lacks a bona fide relationship with a person or entity in the United States. That is no minor outcome: As the Government itself acknowledges, some 175,000 refugees currently lack a formal assurance. Mot. 24. Many of those refugees—as well as countless visa applicants from the targeted nations—will be unable to demonstrate any other form of bona fide relationship with an American party, meaning that they will be absolutely barred from entering the country in the next several months. In the case of refugees, the Government's guidance suggests it will not even process many of their applications, meaning the delay on entry will extend well past the 120 day life of the ban.

To be sure, these effects may be less dramatic than the Government hoped, but they are precisely what an equitable balance of the hardships demands. At issue are some of the world's most vulnerable people, and when they have a bona fide relationship with a person or entity in the United States, the injunction applies.

A. Refugees With Formal Assurances Remain Covered By The Injunction.

1. This Court's guidance with respect to refugees was straightforward: The injunction continues to apply where a U.S. entity "has a bona fide relationship with a particular" refugee such that the entity "can legitimately claim concrete hardship if that person is excluded." *IRAP*, 137 S. Ct. at 2089. As this Court recently

explained, "when we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'" *Spokeo Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016). The Government's own submissions in the District Court easily establish both that there is a bona fide relationship between a refugee and the resettlement agency that provides the refugee's formal assurance, and that—as a result of this relationship—the agency and its local partners will suffer real hardship if the refugee is excluded.

As the Government's declaration explains, when a resettlement agency submits an "assurance," it makes a "written commitment * * * to provide, or ensure the provision of" basic services to the "refugee[] named on the assurance form." Bartlett Decl., Att. 2, D. Ct. Dkt. 301-1, at Page ID # 5694. The same document demonstrates that the resettlement agency must invest extensively in its relationship with the named refugee well before she arrives. Notably, the agency must provide "[p]re-[a]rrival services" for the refugee, including "[a]ssum[ing] responsibility for sponsorship," "plan[ning] for the provision" of "health services," *id.* at Page ID # 5702, and making arrangements for children who must be placed in foster care, *id.* at Page ID # 5715. The resettlement agency must also take all steps necessary to ensure that, as soon as the refugee gets off the plane, she is "transported to furnished living quarters," receives "culturally appropriate, ready-to-eat food and seasonal clothing," and has her "basic needs" met for at least thirty days. *Id.* at Page ID ## 5704-5708. And that is only the beginning of the countless tasks, large and small, that the entity must prepare to undertake as soon as it

submits the formal assurance. *See* Br. of HIAS & IRAP as *Amicus Curiae* at 6-7, D. Ct. Dkt. 297-1; Hetfield Decl., D. Ct. Dkt. 297-3, (detailing the investment by resettlement agencies).

When a refugee is not permitted to enter the country, this extensive investment is wasted, and the agency experiences concrete economic hardship. Agencies pour private resources into their refugee services. *See, e.g.*, Decl. of L. Bartlett at 80, 83, 86, *Texas Health and Human Services Comm'n* v. *United States*, No. 3:15-cv-3851 (N.D. Tex. Jan. 5, 2016), ECF No. 304-1 (documenting the private resources resettlement agencies devote to refuges). If a particular refugee does not enter the country, the resources the agency expends preparing for her arrival are deprived of their value, ultimately doing nothing to forward the agency's mission. *See Vill. of Arlington Heights* v. *Metro Hous. Dev. Corp.*, 429 U.S. 252, 262-263 (1977) (organization experiences concrete "economic injury" as a result of expenditures on planning and review).

Further, the agency loses financial support that it would otherwise receive. Each resettlement agency receives "partial" funding from the Government for the resettlement services it performs as a result of its relationship with a particular refugee, but a substantial portion of that funding is withheld unless the refugee "actually arrive[s] in the United States." Bartlett Decl., Att. 2, D. Ct. Dkt. 301-1, at Page ID # 5684. The loss of these federal funds is itself a "concrete injury." *Clinton* v. *City of New York*, 524 U.S. 417, 430-431 (1998). Indeed, the financial harms threatened by EO-2 have already forced some agencies to downsize. *See* Br. for

Interfaith Group of Religious & Interreligious Organizations as *Amicus Curiae* at 20-21, *Trump* v. *Hawaii*, No. 16-1540 (U.S. June 12, 2017) ("Interfaith Amicus Br.").

Nor is the resettlement agencies' concrete hardship merely economic. Resettlement agencies are motivated by a moral—and typically a religious—commitment to serve refugees. Six of the nine major resettlement agencies have an explicitly religious mission. For example, the U.S. Conference of Catholic Bishops and its local affiliates receive the largest share of federal resettlement funding. *See* Peter Feuerherd, *Parishes play a vital role in refugee resettlement*, U.S. Catholic (Nov. 22, 2016), https://goo.gl/2sgfdc. That organization and the parishes that participate in preparing for and welcoming refugees do so because it is part of "the church's social justice vision." *Id.* The experience of sponsoring refugees creates "a connection with the people who are the least of these," making "the gospel a real thing." *Id.* Other religious organizations similarly regard preparing for and ministering to refugees as part of their religious practice. *See, e.g.*, Interfaith Amicus Br. at 19-20: Kekic Decl., D. Ct. Dkt. 344-1; Hetfield Decl., D. Ct. Dkt. 297-1. Preventing the arrival of these refugees interferes with this religious exercise by severing the relationship between the religious organizations and the particular refugees whom they are prepared to welcome. And these agencies' hardship is compounded by the knowledge that their ministries are being impeded by an Executive Order that itself violates the religious freedoms enshrined in the First Amendment.

2. The Government offers a series of reasons why it believes the District Court should have discounted these obvious hardships. None of them, however, has any basis in the equitable logic of this Court's opinion or the realities of how resettlement agencies operate.

The Government first argues (at 22) that there is no relationship between a resettlement agency and the particular refugees it has agreed to sponsor because an agency may "prepare for the refugee's arrival without directly interacting with the refugee abroad." But the same is true of the relationship between a U.S. entity and an invited lecturer. *See IRAP*, 137 S. Ct. at 2088. Entities often arrange lecturers through the speaker's organization or agent, but this Court made clear that a bona fide relationship exists all the same. Likewise, there is no requirement in the Court's order that a foreign national have any direct contact with—or even have met—his "close familial relations" in the United States. *Id.* As these examples demonstrate, it is not "direct[] interact[ion]" that defines a qualifying relationship; it is the extent to which excluding the particular alien will inflict direct, cognizable harm on an American individual or entity.

The Government next denies (at 23) that a resettlement agency will experience any concrete hardship from the exclusion of a refugee it has agreed to sponsor, suggesting that the agency's injury is no greater than that experienced by an entity that forms a relationship "simply to avoid" the Order. That is wrong. An agency that decides to form a relationship with a refugee in an attempt to skirt EO-2 courts its own injury, and fails under the plain terms of the Court's order. *See*

IRAP, 137 S. Ct. at 2088 (stating that a relationship qualifies only if it is "formed in the ordinary course"). Not so for an agency that, prior to the issuance of the partial stay, formed a sponsorship relationship because it had a decades-old mission to welcome refugees and a contract with the Government to do so. The latter agency, unlike the former, has every right to expect that its investment in the relationship will culminate in the refugee's admission. The Government has no basis to argue that the harm such an agency suffers from losing that investment and being unable to carry out its mission is less "concrete" or "weighty" than the harm a university suffers from being unable to educate students or an audience suffers from being unable to hear a lecturer. *IRAP*, 137 S. Ct. at 2087-88.

The Government also attempts to minimize the hardship to the resettlement agencies by mischaracterizing the extent of their individualized investment in the refugees they sponsor. For example, the Government states (at 21) that a refugee is simply "assigned to a resettlement agency." In fact, as the State Department explains, the nine major resettlement agencies meet weekly to "review the biographic and other case records" of refugees in order to decide which agency will sponsor the refugee and where the refugee will be resettled. U.S. Dep't of State, *The Reception and Placement Program* (last visited July 17, 2017 8:35 PM EDT), https://goo.gl/XXgAWV. "During this meeting, the resettlement agencies *match the particular needs of each incoming refugee* with the specific resources available in a local community." *Id.* (emphasis added). As a result of that meeting, a resettlement agency or its affiliate submits the formal assurance promising to meet those needs

itself or to cooperate with state and local groups to ensure that the needs are met. *See id.*

The Government also suggests several times that a resettlement agency merely provides services "after the refugee arrives in the United States," or "once the refugee arrives." Mot. 20-21, 23. But as mentioned, the Government itself requires resettlement agencies to perform "*pre*-arrival services." *Supra* p. 19. And the agencies and their partners often spend months preparing to meet the needs of a particular refugee family. For example, a church community may agree to cosponsor a family, devoting extensive time to finding suitable housing and schooling opportunities for the refugees, and even purchasing gifts for the children.[5] Those activities are occurring *now*.

3. Finally, lacking any basis in the reasoning of this Court's opinion for its argument, the Government throws up its hands and asserts that the stay *must* permit the exclusion of refugees with formal assurances because otherwise its "application to Section 6(a) and 6(b)" will be "largely inoperative." Mot. 25. That is wrong, root and branch.

First, as the Government ultimately acknowledges, it is simply untrue that the District Court's decision would deprive Sections 6(a) and 6(b) of meaningful practical effect. The Government does not deny that approximately 175,000

---

[5] *See, e.g.*, Kendra Baker, *Wilton welcomes Syrian refugee family*, Wilton Bulletin (Mar. 10, 2016), https://goo.gl/5qyct5; Juliemar Ortiz, *3 Branford churches work together to bring in refugee family from Iraq*, New Haven Register (Mar. 20, 2016), https://goo.gl/y4jKHY.

refugees currently lack formal assurances. *See* Mot. 24. Unless those refugees have another bona fide relationship with an American, the stay will prevent them from obtaining one, since the Government adjudicates applications for refugee status *before* a formal assurance is issued, and its current guidance indicates that it will suspend the adjudication of applications for those without a bona fide relationship. *See* Dep't of Homeland Security FAQs at Q.28, D. Ct. Dkt. 301-5. That means that the District Court's decision regarding formal assurances does not affect the Government's authority to apply its refugee ban to more than 85% of refugee applicants already in the pipeline.

The Government complains that that is not good enough, because approximately 24,000 refugees already have a formal assurance, and as a practical matter it is unlikely to admit many more than that before the end of this fiscal year. *See* Mot. 24-25. That is simply irrelevant. The Government's professed inability to admit more refugees has no basis in law: The Government is nowhere near the original 2017 cap of 110,000. *See* Presidential Determination on Refugee Admissions for Fiscal Year 2017, 81 Fed. Reg. 70315 (Sept. 28, 2016) (setting 110,000-refugee cap for fiscal year 2017); Camila Domonoske, *U.S. Refugee Admissions Pass Trump Administration Cap of 50,000*, NPR (July 12, 2017), https://goo.gl/DWm8QT (reporting that the Government surpassed 50,000 refugee admissions on July 12). Rather, the Government has simply processed applications

slowly (indeed, more slowly than in prior years,[6] despite the injunctions) and it expects to continue to do so. But this Court has no obligation to tailor its injunction to ensure that Government's deliberate pace grinds to a halt. That is particularly so because this Court expressly declined to stay the injunction of EO-2's reduced refugee cap as to aliens who have a bona fide relationship with a U.S. entity. *IRAP*, 137 S. Ct. at 2089.

In any event, Sections 6(a) and 6(b) will continue to have a profound effect on hundreds of thousands of individuals whether or not those provisions actually lead them to be stopped at the border. So long as the Court's stay is in force, the Government is free to deny refugee status to individuals without a formal assurance (or any other relation), halting the processing of their refugee applications and causing them to lose precious time.

Moreover, the Government's demand runs directly contrary to this Court's opinion announcing its stay. The Court held that the equities tip in the Government's favor only when the exclusion of a refugee will not impose "concrete hardship" on an American entity. *IRAP*, 137 S. Ct. at 2089. Here, it is obvious that excluding refugees with a formal assurance will severely burden the resettlement agencies and the state and local entities with which they partner.[7] That is the end

---

[6] *See, e.g.*, Lomi Kriel, *Flow of refugees to U.S. declines*, Houston Chronicle (May 26, 2017), *available at* https://goo.gl/Je1eEH.

[7] Indeed, it is notable that the Ninth Circuit recognized that the implementation of the Order inflicts concrete harms on the *State* refugee programs, even though those programs have—if anything—a less direct connection with the refugees that will be resettled in the State. *See Hawaii* v. *Trump*, 859 F.3d 741, 767 (9th Cir. 2017).

of the matter: The District Court correctly held that EO-2 may not be applied to refugees with formal assurances.

B. The District Court Correctly Held That This Court's Order Protects Grandchildren, Nieces, And Other Close Relatives Of Persons In The United States.

The District Court was also correct to reject the Government's unduly restrictive definition of "close family." The Government maintained, in the District Court as here, that Americans lack a "close familial relationship" with their grandparents, grandchildren, aunts, nieces, and cousins, and that excluding those relatives inflicts no "concrete * * * hardship[]" on anyone in the United States. *IRAP*, 137 S. Ct. at 2088. That argument is as wrong as it sounds, and nothing in this Court's opinion, the immigration laws, or common sense supports it.

1. This Court made plain that EO-2 "may not be enforced against foreign nationals who have *** a close familial relationship" with a U.S. person. *Id.* Further, the Court explained, "Dr. Elshikh's mother-in-law[] *clearly* has such a relationship." *Id.* (emphasis added). Yet all of the relations the Government seeks to bar from this country—from brothers-in-law to grandparents—are within at least the same "degree of kinship" as a mother-in-law. *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 505-506 (1977) (plurality opinion). A brother-in-law is the brother of a person's spouse; a niece is the daughter of one's brother or sister. These relations are just as "close," if not closer, than the mother of a person's spouse. *IRAP*, 137 S. Ct. at 2088. If a mother-in-law is "*clearly*" within the scope of the injunction's protection, then these relatives must be as well. *Id.* (emphasis added).

Furthermore, U.S. persons indisputably suffer "concrete *** hardship[]" from the exclusion of these relatives. *Id.* Compelling a grandparent to be apart from his grandchild—especially one seeking refuge from violence or persecution—inflicts hardship of unbearable severity. So does separating an individual from his nephew or cousin; Mwenda Watata, one of the affiants in this case, has attested to the profound suffering he, his wife, and his children have experienced from being separated from their nephew and cousin, currently stranded in a Malawi refugee camp, whom they know only as a "son" and "sibling[]." Watata Decl. ¶¶ 17-23, D. Ct. Dkt. 344-3; *see also* Feruzi Decl. ¶¶ 10-11, D. Ct. Dkt. 344-2.[8] That harm is appreciably greater than the burden of being unable to hear a "lecturer" or employ a "worker" of one's choosing. *IRAP*, 137 S. Ct. at 2088.

Indeed, this Court has repeatedly recognized that grandparents, cousins, and the like are "close relatives" whose separation inflicts a significant and cognizable harm under the law. In *Moore*, the Court held that a "venerable" constitutional tradition protects the right of "*close relatives*" such as "uncles, aunts, cousins, ***

---

[8] The Government suggests (at 33-34) that aliens like Watata might be able to obtain relief through EO-2's waiver provision. That is only true, however, of individuals covered by Section 2(c). The Government has instructed refugee officers, in contrast, that they may grant waivers from the refugee ban "until the 50,000 [refugee] ceiling" in Section 6(b) "has been met," Dep't of Homeland Security FAQs at Q.28, D. Ct. Dkt. 301-5, and that ceiling was surpassed last week, *see* Camila Domonoske, *U.S. Refugee Admissions Pass Trump Administration Cap of 50,000*, NPR (July 12, 2017), https://goo.gl/Vs52jP. Accordingly, refugees like Watata's nephew can no longer obtain waivers, regardless of how profound the hardship their exclusion would cause. Anyway, foreign nationals whose exclusion would "burden" U.S. persons are entitled to the protection of this Court's order, not merely whatever discretionary relief administrative officers choose to provide.

grandparents" and other "relatives in this degree of kinship" to "live together" and "shar[e] a household." 431 U.S. at 504-506 (emphasis added). In *Reno* v. *Flores*, 507 U.S. 292 (1993)—an immigration case—the Court explained that a person's "aunt[s], uncle[s], [and] grandparent[s]" are "*close blood relatives*, whose protective relationship with children our society has *** traditionally respected." *Id.* at 297, 310 (emphasis added). Other decisions are to the same effect. *See Overton* v. *Bazzetta*, 539 U.S. 126, 131 (2003) (describing "right to maintain *** association between grandchildren and grandparents"); *Smith* v. *Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 843 & n. 49. (1977) (explaining that this right "extends beyond natural parents" to a child's "aunt and legal custodian" (citing *Prince v. Massachusetts*, 321 U.S. 158, 159 (1944))).

The Government responds (at 29) that foreign relatives may not have the same "due-process rights" as Americans. But this Court's focus was on their family members living in the United States, who—as the Government admits—"indisputably ha[ve] due process rights." In any event, what matters under the plain text of this Court's opinion is that they are "close relatives," and these precedents make plain that they are. *E.g.*, *Moore*, 431 U.S. at 504-505.

Reading this Court's order to extend to such elemental family relationships does not "empt[y] the Court's decision of meaning." Mot. 3-4. Plaintiffs do not dispute that the Court's order affords no protection to distant family members, such as second-cousins and great-aunts. Nor does it protect non-familial associates of individuals within the United States. Such connections are sufficiently remote or

informal that impairing them imposes burdens that are, "at a minimum, a good deal less concrete" than what close relatives suffer. *IRAP*, 137 S. Ct. at 2088. The barest common sense, however, confirms that severing the relationship between grandfather and granddaughter, or uncle and nephew, inflicts "legally relevant hardship" on a U.S. person. *Id.*; *see* Add. 15.

2. The Government's argument to the contrary rests principally on its claim that an alien's "close family" should be limited to those relations listed in certain provisions of the Immigration and Nationality Act. This argument is meritless: It flatly contradicts this Court's opinion and fails even on its own terms.

The first problem is straightforward. As the Government ultimately must acknowledge, one of the two familial relationships this Court said was "clearly" close—that between Dr. Elshikh and his mother-in-law—is not found in any provision of the immigration laws the Government cites. Mot. 35. Rather than accepting this fact as fatal to its argument, the Government soldiers on, speculating that when the Court said "mother-in-law," it really meant "mother," because it was *sub silentio* relying on the fact that Dr. Elshikh's wife is a U.S. citizen. *See id.* The Court never so much as hinted, however, that it was concerned with the burden on Dr. Elshikh's wife; on the contrary, it said that the injunction was justified because of "the concrete burdens that would fall on *** *Dr. Elshikh*"; that EO-2 may not be enforced against "parties similarly situated to *** *Dr. Elshikh*"; and that "*Dr. Elshikh's mother-in-law*[] clearly has [a qualifying] relationship." *IRAP*, 137 S. Ct. at 2087-88 (emphases added). Even the Government tacitly acknowledges as much,

as it categorically deems mothers-in-law and children-in-law of U.S. persons "close family," regardless of whether they actually have a child or parent in the country. Mot. 34-35.

Furthermore, the Government has failed to identify a coherent reason why the immigration laws *should* serve as an "appropriate point of reference" in determining the scope of this Court's stay. Mot. 27. This Court based its stay on the "equitable judgment" that aliens whose exclusion would inflict "concrete hardship" on a U.S. person should be protected. *IRAP*, 137 S. Ct. at 2088. When Congress enacted the numerous, widely divergent definitions of "family" in the INA, in contrast, its attention was trained on entirely different problems: in some cases, performing the "unavoidably zero-sum" task of "allocating a limited number of [immigrant] visas," *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2213 (2014) (plurality opinion) (discussing 8 U.S.C. § 1153(a)); in others, providing a clear but "unyielding" definition that would be easy to apply, *INS* v. *Hector*, 479 U.S. 85, 88, 90 n.6 (1986) (per curiam) (discussing 8 U.S.C. § 1254(a)(1) (1986)). Those provisions shed no light on the equitable question this Court sought to answer. Nor does the maxim that "equity follows the law" require the Court to blindly transplant those judgments to this different and inapposite circumstance; contrary to the Government's insinuation (at 27), all that principle means is that courts "may not 'create a remedy in violation of law, or even without the authority of law.'" *Douglas* v. *Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (quoting *Rees* v. *Watertown*, 19 Wall. 107 122 (1874)).

In any event, to the extent Congress and the Executive have considered who counts as "close family," their judgments contradict the Government's definition. In the Family Sponsor Immigration Act of 2002, Pub. L. No. 107-150, Congress amended the immigration laws to provide that where the sponsor of an alien's immigrant visa petition has died, another member of the alien's "close family" may sponsor her for admission, and it included in that term an alien's "sister-in-law, brother-in-law, grandparent, or grandchild." *Id.* § 2(a) (codified at 8 U.S.C. § 1183a(f)(5)); *see* H.R. Rep. 107-207, at 2 (2001) (provision permits "close family member[s]" to be sponsors). In a remarkable bit of doublespeak, the Government suggests (at 31) that this provision supports its distinction between "close" and "extended" family. But the provision explicitly refers to siblings-in-law, grandparents, and grandchildren as "close family"; there is no ambiguity about it. Other provisions of the INA likewise permit persons in the United States to sponsor their "grandchildren," "grandparents," "nieces," and "nephews" for immigration or naturalization[9]—in each instance indicating that Congress believed such persons have a concrete and cognizable stake in their relatives' entry.

For decades, the Executive has made the same judgment. The Board of Immigration Appeals has long held that an alien has "close family ties" with this

---

[9] *See* 8 U.S.C § 1433(a) (permitting a child's grandparent to sponsor him for naturalization if his parent has died); *id.* § 1101(a)(15)(T)(ii)(III) (authorizing a victim of human trafficking admitted on a T visa to obtain admission on behalf of her "[g]randchild(ren)," "[n]iece[s]," and "nephew[s]," 81 Fed. Reg. 92,266, 92,280 (Dec. 19, 2016)); USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 421(b)(3) (permitting the grandparent of a child orphaned by the September 11, 2001 attacks to apply for admission).

country for purposes of obtaining cancellation of removal or waiver of inadmissibility if a sibling-in-law, grandchild, or similar relation lives here. *See, e.g.*, *In re Mulholland*, 2007 WL 2299644, at *1 (BIA July 12, 2007); *In re Gomez*, 2006 WL 2391225, at *1-*2 (BIA July 6, 2006). The Lautenberg Amendment permits certain aliens with "close family in the United States" to apply for refugee status, a term the Executive itself has interpreted to include grandparents.[10] U.S. Dep't of State, *Proposed Refugee Admissions for Fiscal Year 2017* (Sept. 15, 2016), https://goo.gl/K7vvgs; *see* Add. 23. And a longstanding regulation provides that juvenile aliens may be released to the custody of an "aunt, uncle, [or] grandparent," 8 C.F.R. § 236.3(b)(1)(iii), relations whom this Court in *Reno* referred to more than half a dozen times as an alien's "close relatives," 507 U.S. at 302, 303, 306, 310, 313; *see also* 69 Fed. Reg. 69,480, 69,488 (Nov. 29, 2004) (authorizing certain aliens to apply for asylum if a "grandparent, grandchild, aunt, uncle, niece, or nephew" resides in the United States).

Rather than relying on these provisions defining the very sort of "close family relationship" the Court's opinion discusses, the Government fixates on those provisions that determine who "can petition for an *immigrant* visa." Mot. 28 (emphasis added). But those provisions provide an exceptionally poor guide to determining the scope of this Court's stay. They expressly denominate the listed

---

[10] For precisely this reason, the District Court was correct to hold that refugees in the U.S. Refugee Admissions Program by virtue of the Lautenberg Amendment are categorically protected by the injunction. Every such refugee, by definition, has close family in the United States.

family members as "*immediate* relatives," not close relatives. 8 U.S.C. § 1151(b)(2)(A)(i) (emphasis added). They are underinclusive even by the Government's own lights—excluding not only mothers-in-law, but also children-in-law, parents of minors, and fiancés. *See id.* §§ 1151(b)(2)(A)(i), 1153(a); *cf. id.* §§ 1101(a)(15)(K), 1184(d) (authorizing fiancés to obtain only nonimmigrant visas). And they are used to determine access to one of the most restricted and "highly sought-after" benefits in the immigration laws: the right to reside in the United States *permanently*. *Cuellar de Osorio*, 134 S. Ct. at 2197. The Court's order, in contrast, merely allows aliens to *seek* entry the country on any basis, even *temporarily*, whether as an immigrant, a nonimmigrant, or a refugee. There is no reason to think Congress would have wished its restrictive definition of "immediate family" for purposes of immigrant visas to control access to that barebones right.[11]

3. Finally, grasping at any straw it can find, the Government points to EO-2's own waiver provisions. *See* Mot. 26-27. Those provisions are triply irrelevant. First, the Court said that "[t]he facts of these cases," not the terms of the very order it left enjoined, "illustrate the sort of relationship that qualifies." *IRAP*, 137 S. Ct. at 2088. Second, nearly all of the examples the Court gave—Dr. Elshikh's mother-in-law, the newly-admitted University students, and the invited lecturer—do not

[11] The Government (at 30) claims that its reading is "confirm[ed]" by 8 U.S.C. § 1182(a)(3)(D)(iv), a provision establishing an exception to the bar on entry by members of Communist and totalitarian parties for persons with a parent, spouse, child, or sibling in the United States. The Government does not offer a theory as to why this obscure provision is relevant to the scope of the Court's stay, let alone more relevant than the provisions the District Court identified, and none is apparent.

fall within any of the waiver provisions. Order § 3(c). And, third, the waiver provisions themselves offer only a very short illustrative list of close family members—"e.g., a spouse, child, or parent," *id.* § 3(c)(iv)—that is grossly under-inclusive even by the Government's standard, omitting fiancés, siblings, and parents-in-law. They therefore shed no light whatsoever on the current extent of the injunction.

In the District Court, the Government supplemented this request with a plea for "deference." *See* Add. 15 n.10. It has apparently abandoned that contention here, and wisely so. For one thing, as this Court has explained, the subject of an injunction cannot "undert[ake] to make [its] own determination of what the decree mean[s]." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). For another, this Court defers to the Executive in the "construction of * * * statutes, not of [the Court's] opinions." *NLRB* v. *Int'l Bhd. of Elec. Workers, Local 340*, 481 U.S. 573, 597 (1987) (Scalia, J., concurring in the judgment). The District Court carefully interpreted this Court's order, and held that it protects grandchildren, grandparents, and other "close blood relatives" whose exclusion would plainly inflict hardship on Americans. That judgment was correct, and there is no basis for this Court to disturb it.

III. THIS COURT SHOULD NOT STAY THE DISTRICT COURT'S ORDER MODIFYING THE INJUNCTION.

The Government closes its procedurally inappropriate motion with yet another request for unwarranted relief. It asks this Court (at 36) to stay the District Court's modified injunction pending disposition of its motion. But as the

Government acknowledges, that relief is available only where both certiorari and reversal are likely, *and* the equities favor the applicant. *See, e.g.*, *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987). The Government obviously has not met its burden with respect to the first two factors: The Court is unlikely to review—and even less likely to reverse—the District Court's correct, fact-bound determination that the Government has been violating the injunction.[12]

Moreover, even if the Government could overcome that obstacle, this Court has already found that the balance of the harms counsel *against* a stay. *See IRAP*, 137 S. Ct. at 2087-88. The Government's current implementation of EO-2 inflicts profound harms on individuals and entities within the United States, separating families and thwarting entities' spiritual and tangible investments in the arrival of particular refugees. These are precisely the kind of injuries that this Court held sufficient to justify an injunction. *Id.* at 2087. The Government counters that its own national security interests are also profound, but the very quotation it uses from this Court's opinion observes that those harms are most pressing "when there is *no* tie between [a] foreign national and the United States." Mot. 38 (quoting *IRAP*, slip op. at 13) (brackets in Motion). No amount of deference to the

---

[12] The day after making its stay request in this case, the Government filed an identical stay request in the Ninth Circuit, which is currently pending. The pendency of that request is reason alone to deny a stay. *See, e.g.*, *Krause* v. *Rhodes*, 434 U.S. 1335, 1335-36 (1977) (Stewart, J., in chambers); *see also* Barbara J. Van Arsdale et al., Federal Procedure, Lawyers Edition § 3:304, Westlaw (June 2017 Update) ("While an application for a stay is pending in the lower court, a similar application will normally be denied by the Supreme Court Justice.").

Executive's national security interests can erase the existence of the ties held by relatives and refugees with sponsorship agreements.[13]

The Government also points to the fact that it is "in the midst of implementing the Order," and that the District Court's decision will lead to the "uncertainty and confusion that the government has worked diligently to prevent." Mot. 38. First of all, the Government has already implemented the District Court's order. *See* Suppl. Add. 2; *see also* U.S. Dep't State, *Revised Guidance on Determining Close Family Under Executive Order 13780 Section 2C* (July 14, 2017), *reproduced at* https://goo.gl/ER1LRQ (updating definition of "close family" exempted from Order § 2(c) to include "grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts and uncles, nephews and nieces, and cousins"). If shifting policy engenders confusion, then that is all the more reason to *deny* the stay now. *Louisiana* v. *United States*, 1966 WL 87237, at *1 (U.S. Aug. 12, 1966) (Black, J., in chambers) (denying stay because the contested order had already been implemented). In any event, the new guidance and administrative process the Government announced to implement the District Court's order is *simpler* than

[13] The Government cites *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 134 S. Ct. 893 (2013), as precedent supporting the issuance of a stay here. But the cases could not be more different. In *Little Sisters*, the applicants first requested the relief from the court of appeals and proceeded to this Court only *after* that request was denied. More importantly, because of a statutory deadline for compliance, the applicants in *Little Sisters* could credibly demonstrate that they would face irreparable harm *within hours* unless their stay was granted. And, ironically, the irreparable harm the Court presumably found sufficient to merit a stay was the Government 's interference in the applicants' religious practice. That harm, of course, is one of the chief injuries the District Court's injunction is designed to prevent.

what it sought to do before the District Court ruled. *Compare* D. Ct. Dkt. 329-6, *with* Suppl. Add. 2.

Second, this is a problem entirely of the Government's own creation. If the Government thought the scope of this Court's stay unclear—which it is not—it should have sought clarification of its obligations before implementing the bans. *See Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 15 (1945); 11A Charles Alan Wright et al., Federal Practice & Procedure § 2956, Westlaw (3d ed., April 2017 Update) ("[A]n interested individual who is confused as to the applicability of an injunction to him or whether the scope of an order applies to certain conduct may request the granting court to construe or modify the decree."). Instead, the Government chose to embark on "program of experimentation with disobedience of the law," imperiling the rights of countless Americans. *McComb*, 336 U.S. at 192. The Government should not be heard to complain if that "program" did not turn out well. *Id.*

CONCLUSION

For the foregoing reasons, the Government's Motion should be denied.

Respectfully submitted,

/s/ Neal Kumar Katyal

NEAL KUMAR KATYAL*
COLLEEN ROH SINZDAK
MITCHELL P. REICH
ELIZABETH HAGERTY
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com
*Counsel of Record

DOUGLAS S. CHIN
Attorney General of the State of Hawaii
CLYDE J. WADSWORTH
Solicitor General of the State of Hawaii
DEIRDRE MARIE-IHA
DONNA H. KALAMA
KIMBERLY T. GUIDRY
ROBERT T. NAKATSUJI
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL,
STATE OF HAWAII

425 Queen Street
Honolulu, HI 96813

Counsel for the State of Hawaii

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

SARA SOLOW
ALEXANDER B. BOWERMAN
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103

Counsel for Respondents

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Neal Kumar Katyal, a member of the Supreme Court Bar, hereby certify that one copy of the foregoing Response to Application for Stay was served via electronic mail and Federal Express on July 18, 2017 on:

JEFFREY B. WALL
Acting Solicitor General
U.S. DEPARTMENT OF JUSTICE
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217
Counsel for Applicants

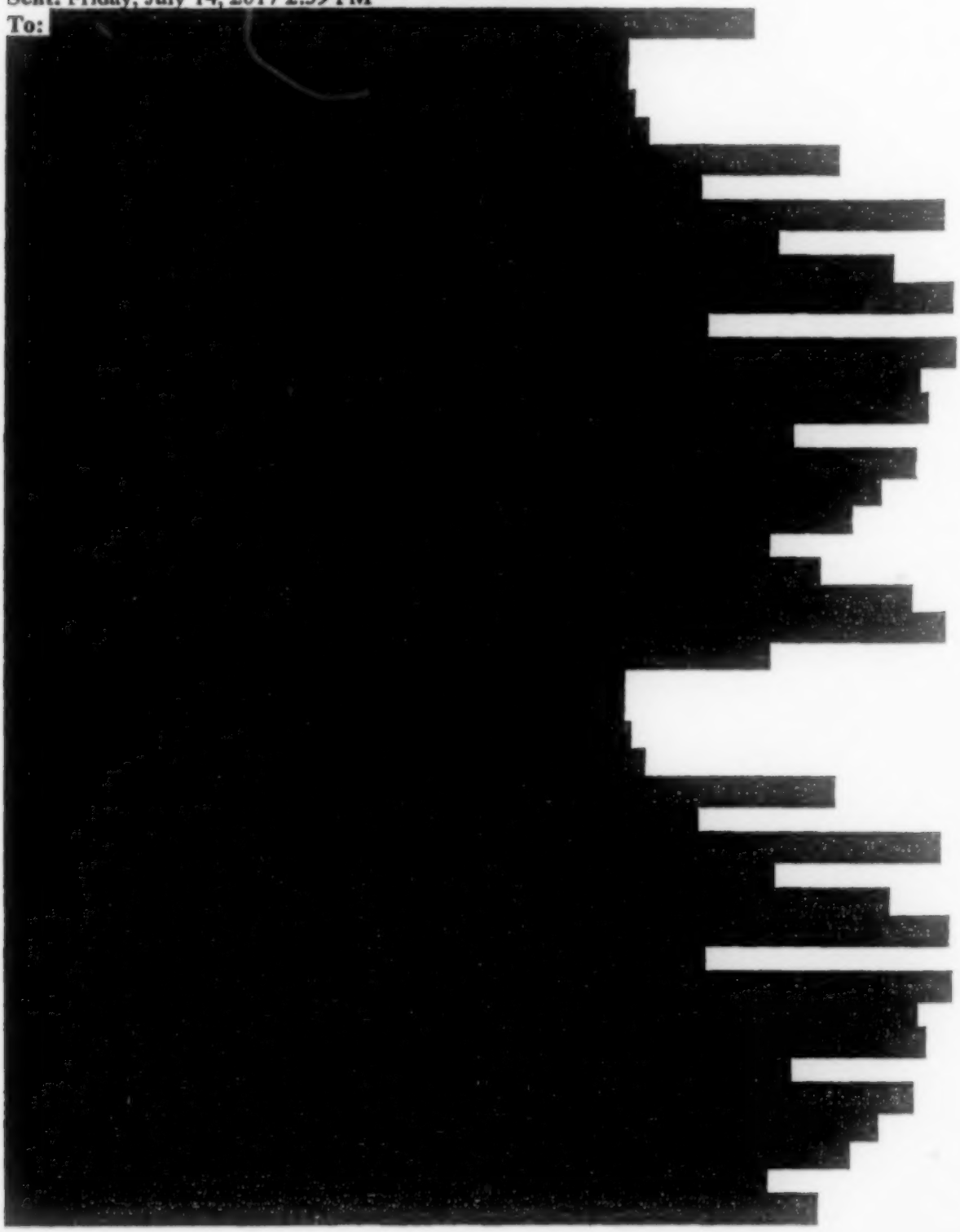
/s/ Neal Kumar Katyal
Neal Kumar Katyal

RESPONDENTS' SUPPLEMENTAL ADDENDUM

E-Mail from Lawrence E. Bartlett, U.S. Dep't of State: *Message #20: Update on Refugee Admissions and Operations* (July 14, 2017)* 1

* The identities of the recipients of this communication and all e-mail addresses, mailing addresses, and telephone numbers have been redacted.

From: Bartlett, Lawrence E. [redacted]
Sent: Friday, July 14, 2017 2:59 PM
To: [redacted]



[redacted]

Subject: Message #20: Update on Refugee Admissions and Operations

Dear Colleagues,

On July 13, 2017, the District Court in Hawaii enjoined the U.S. Government from applying the 120-day refugee suspension and 50,000 refugee cap to: refugees who have received a formal assurance from a resettlement agency in the United States; those who are in the Lautenberg Program; or those individuals who have the following family relationships to an individual in the United States (regardless of lawful status): grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States. (These family relationships are in addition to the relationships previously included in the definition of close family relationships, specifically: a parent (including parent-in-law), spouse, fiancé, fiancée, child, adult son or daughter, son-in-law, daughter-in-law, sibling (whether whole or half), including step relationships.)

Accordingly, please proceed to book travel for all refugees who already have an assurance and are otherwise cleared for travel or as they become cleared in the future.

Because a refugee with an assurance who is cleared for travel to the United States does not require any additional basis to come within the district court's injunction, there is no need to assess in connection with booking travel whether the refugee is in the Lautenberg Program or otherwise has a credible claim to a bona fide relationship with a family member or entity in the United States at this time.

With respect to refugees who have not yet received an assurance, we will provide further advice as we develop guidance on this issue.

Lawrence Bartlett

Director, Refugee Admissions • Bureau of Population, Refugees, and Migration • U.S. Department of State

[redacted]

ORIGINAL

No. 16-1540 (16A1191)

Supreme Court, U.S.
FILED
JUL 18 2017
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

#16-

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

STATE OF HAWAII, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF MOTION FOR CLARIFICATION OF JUNE 26, 2017, STAY RULING AND APPLICATION FOR TEMPORARY ADMINISTRATIVE STAY OF MODIFIED INJUNCTION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 16-1540 (16A1191)

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

STATE OF HAWAII, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF MOTION FOR CLARIFICATION OF JUNE 26, 2017, STAY RULING AND APPLICATION FOR TEMPORARY ADMINISTRATIVE STAY OF MODIFIED INJUNCTION

This Court's June 26, 2017, stay ruling was intended to allow Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), to take effect, except for those aliens with a substantial connection to a U.S. person or entity. Respondents, however, seek to drain it of meaning. As to refugees, they claim that a sponsorship-assurance agreement between the government and a resettlement agency suffices to exempt the refugee from the stay. But that agreement does not reflect any relationship with the

refugee, let alone one independent of the refugee-admission process itself. Moreover, as the district court noted, respondents "do not dispute that before any refugee is admitted to the United States under the [United States Refugee Admission Program (Refugee Program)], the Department of State must receive" an "assurance." Addendum to Gov't Mot. for Clarification (Add.) 16; see Resps. Opp. to Gov't Mot. for Clarification (Opp.) 24-25. Respondents thus do not dispute that, under their interpretation, this Court's stay ruling would bar enforcement of Sections 6(a) and 6(b) as to virtually all refugee applicants who would have entered but for those provisions while they are in effect. Opp. 18-27. Respondents likewise assert (Opp. 29) that "close" family members include all family members except such "distant" relatives as "second-cousins" and "great-aunts." But as this Court made clear, its stay ruling applies only to aliens with certain immediate relations analogous to the "[t]he facts of these cases," Trump v. IRAP, No. 16-1436 (June 26, 2017) (per curiam), slip op. 12, and neither of these cases involved the extended family relationships posited by respondents. In short, respondents seek to distort this Court's carefully crafted stay and render a significant part of it a virtual nullity. The government respectfully requests that the Court reject that proposal.

The stark division between the parties' interpretations -- and the practical need for immediate clarity -- likewise warrant this Court's intervention now. Despite commencing emergency

litigation precisely to bring clarity to these issues, respondents now urge this Court to withhold clarification -- not due to any purported lack of authority to do so, but rather to await the outcome of further litigation in the lower courts. That makes no sense. This Court issued its stay ruling pending its resolution of the merits; it is the only court that can provide definitive clarification of the meaning of its stay order. Awaiting the outcome of lower-court litigation would needlessly delay resolution of these issues and exacerbate the confusion and disruption already caused by the district court's ruling. This Court should therefore grant the motion for clarification and confirm that the government's interpretation is correct. In the interim -- and in the event it prefers the court of appeals to pass on these issues first -- the Court should stay the district court's modified injunction.

I. THIS COURT CAN AND SHOULD CLARIFY THE SCOPE OF ITS STAY RULING

Respondents argue at length (Opp. 9-16) that the Court should decline to provide definitive guidance about its own stay ruling, but they offer no valid reason for withholding clarity and prolonging the uncertainty and potential confusion that the district court's ruling created. Respondents do not dispute the Court's authority to resolve these issues concerning the correct interpretation of its June 26, 2017, stay order -- whether in the form of a clarifying order, or by granting certiorari before judgment or mandamus to correct the district court's error. Cf.

Gov't Mot. for Clarification (Gov't Mot.) 15-18. They assert instead that this Court should wait for the court of appeals to interpret this Court's stay ruling in the first instance. That assertion is without merit.

A. Further proceedings in the lower courts would serve no important purpose because the dispute turns entirely on the meaning of this Court's own stay ruling, which only this Court can conclusively resolve. To be sure, the court of appeals has authority to review and overturn the district court's ruling modifying its injunction. But as the district court itself recognized in holding that respondents should have sought clarification from this Court in the first instance, the lower courts cannot conclusively resolve the meaning of this Court's rulings. See D. Ct. Doc. 322, at 5 (July 6, 2017). Only this Court can do so.

The court of appeals is in no better position than the district court to resolve the legal dispute about the intended scope of this Court's stay. It is certainly no better "equipped" (Opp. 11) than this Court to determine what this Court's stay ruling was intended to reach. This is not a circumstance where "the court of appeals * * * could provide helpful guidance" to this Court. Opp. 14 n.3 (citation omitted). And there is no realistic prospect that intermediate appellate review would "obviate the need for this Court's review," ibid. (citation

omitted), given the virtual certainty that the nonprevailing party in the court of appeals would seek this Court's intervention.

Respondents erroneously assert (Opp. 11-12) that the lower courts are better situated to confront the issue in the first instance because the "parties submitted affidavits and other evidence supporting their interpretations" and the dispute concerns "factbound administration of an injunction." Nothing about the parties' dispute over the meaning of this Court's stay ruling, however, requires resolving any disputed facts. The dispute stems from fundamentally different understandings of the correct interpretation of this Court's ruling -- pure questions of law. The district court's relevant holdings did not rest on any "evidentiary determinations and fact finding," Opp. 11, but on its understanding of this Court's decision in light of its terms, various statutory and regulatory provisions, and case law. Add. 11-15, 16-17.

Nor does the district court's ruling entail exercise of any "latitude" that lower courts have in other circumstances "to oversee and administer injunctions." Opp. 13. As the district court here appreciated, it was not exercising discretion to balance the equities anew; its role was limited to "preserv[ing] the status quo or ensur[ing] compliance with its earlier orders," which in turn depended entirely on its understanding of this Court's ruling. Add. 9. In any event, now that the district court has ruled, appellate review of its decision -- which is de novo review of the

legal issues concerning the meaning of this Court's stay ruling -- would be the same in this Court as in the court of appeals.[1]

B. Requiring the parties to pursue further, potentially protracted litigation in the lower courts would only delay nearly inevitable review in this Court after the court of appeals rules. Respondents offer no justification for such a delay. Having filed three emergency motions in the district court and court of appeals since June 29, 2017, seeking urgent judicial intervention, see D. Ct. Doc. 293 (June 29, 2017); C.A. Doc. 2, No. 17-16366 (July 7, 2017); D. Ct. Doc. 328 (July 7, 2017), respondents cannot plausibly dispute that the issues warrant immediate resolution or that delaying definitive resolution would serve no proper purpose. Leaving the district court's modified injunction in effect would only compound the confusion and disruption that its ruling will cause. Respondents' desire to entrench the unwarranted relief the district court granted them is no basis to forestall immediate, authoritative resolution. That is especially so because the Court has already granted certiorari in this case and because the finite periods of Section 2(c)'s and Section 6(a)'s suspensions and

---

[1] Respondents' reliance (Opp. 12) on a one-line order denying a writ of mandamus or prohibition in In re Pennhurst Parents-Staff Ass'n, 449 U.S. 1009 (1980), adds nothing to their argument. That order, like others respondents cite that "summarily denied" relief without explanation (Opp. 10; see Opp. 10-11 & n.1), does not reflect the reason for the denial -- for instance, whether the Court agreed with the lower court's conclusions -- nor does it indicate that the request for relief was improper.

Section 6(b)'s refugee cap under the Order commenced almost three weeks ago.

II. RESPONDENTS' INTERPRETATION OF THIS COURT'S RULING IS WRONG

On the merits, respondents' submission (Opp. 16-35) confirms that the district court's ruling is deeply misguided and that it would substantially prevent implementation of the very measures this Court directed should be permitted to take effect. As to the refugee provisions of Sections 6(a) and 6(b), respondents have no meaningful answer either to the language of this Court's opinion or the practical reality that their reading would effectively nullify the stay as to those provisions while they are in effect. Respondents' understanding of qualifying family relationships is similarly irreconcilable with this Court's decision.

A. Respondents' Position That An Assurance Agreement Alone Establishes A Bona Fide Relationship Effectively Renders This Court's Stay A Nullity As To Sections 6(a) And 6(b)

1. Respondents' position that a sponsorship-assurance agreement between a refugee-resettlement agency and the federal government by itself creates a qualifying relationship between the agency and the refugee that exempts the refugee from this Court's stay fails on its own terms. This Court made clear that only refugee applicants "who can credibly claim a bona fide relationship with a person or entity in the United States" are exempt from Sections 6(a) and 6(b). IRAP, slip op. 13. Assurance agreements fail that test. Respondents do not dispute that the refugee is not a party to the assurance agreement -- which is entered into

between the resettlement agency and the government. Nor do they deny that the agency typically has no contact with the refugee prior to her arrival. See Opp. 18-24; cf. Gov't Mot. 20-24.

Respondents stress (Opp. 19-21) that, due to Sections 6(a) and 6(b), the resettlement agency will not have an occasion to provide the services it renders to a refugee after the refugee's arrival -- pursuant to a contract with, and paid for largely by, the government. But that does not establish any relationship with the refugee, much less a relationship that is independent of the refugee-resettlement process itself. Indeed, as an entity that performs those services on behalf of the government in carrying out a governmental program, a resettlement agency has no cognizable stake in that program's application to the persons whom the program exists to benefit. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990); accord Air Courier Conference of Am. v. American Postal Workers Union, AFL-CIO, 498 U.S. 517, 524-525 (1991). An assurance thus certainly does not make the resettlement agency "similarly situated" to those entities this Court described: an employer that has hired a worker, a school that has admitted a student, or an entity that has engaged a lecturer to speak to an American audience (and whose exclusion might affect the constitutional interests of U.S. persons). IRAP, slip op. 12; see id. at 10-11 (citing Kleindienst v. Mandel, 408 U.S. 753 (1972)). Those entities all have relationships with an alien independent of the process of admission itself under the Immigration and

Nationality Act (INA), 8 U.S.C. 1101 et seq. Respondents' proffered analogy (Opp. 22) to the interaction between a U.S. entity inviting a foreign speaker and the "speaker's organization or agent" elides the fact that the resettlement agency provides services for the refugee under a contract with the U.S. government, not as a result of any existing relationship with the refugee.

This Court never mentioned services that resettlement agencies provide pursuant to a contract with the government in its stay ruling. Respondents' position that the services such agencies provide are nevertheless sufficient to require entry of the alien in the first place lacks any limiting principle and would appear to encompass any number of service providers who purportedly plan to provide services to an alien upon arrival. This Court's ruling cannot plausibly be read so expansively.

2. Respondents' submission also confirms that their reading of this Court's June 26 stay ruling, which the district court adopted, would effectively render that stay a dead letter as to Section 6(a)'s Refugee Program suspension and Section 6(b)'s refugee cap. This Court expressly contemplated that Sections 6(a) and 6(b) would apply to a significant class of refugees. IRAP, slip op. 13 ("As applied to all other individuals," i.e., all except aliens with a qualifying relationship, "the provisions may take effect."). Yet respondents do not dispute that their position would exempt from the Order virtually all of the refugees likely to enter while Sections 6(a) and 6(b) are in effect.

As in the district court, respondents "do not dispute that before any refugee is admitted to the United States under the [Refugee Program], the Department of State must receive" an "assurance." Add. 16; see Opp. 24-25. And they do not deny that the approximately 24,000 refugees who had assurances as of June 30, 2017, are more than the number likely to enter during the relevant period (i.e., while Sections 6(a) and 6(b) are in effect). Gov't Mot. 24 & n.7; see Opp. 25. Respondents also do not dispute that, under their reading, every one of those approximately 24,000 refugees likely to enter thus would be exempt from the stay. They do not and cannot explain why this Court would have granted a stay as to Sections 6(a) and 6(b) if that stay would nevertheless allow virtually every refugee who would otherwise enter during the relevant period to do so.

Respondents argue instead (Opp. 24-25) that their reading does not render this Court's stay ineffectual because approximately 175,000 other refugee applicants do not yet have assurances. They contend that, because assurances are obtained only after a refugee's application is adjudicated, and because Section 6(a) suspends refugee adjudications (except for refugees who have another, independent qualifying relationship with a U.S. person or entity), the government still can prevent those refugees from entering. Ibid. But those additional refugees are unlikely to enter until after Sections 6(a) and 6(b) expire -- i.e., after the 120-day review contemplated by Section 6(a) is complete, and

after the end of this fiscal year (to which the cap under Section 6(b) applies). Gov't Mot. 24 & n.7. From the standpoint of the national-security objectives that underlay Sections 6(a) and 6(b), such a hollow stay is no different than no stay at all.

Moreover, respondents' argument highlights the arbitrariness of the distinction they seek to draw based on assurances. They do not dispute that, going forward, the government may and will adjudicate a refugee application before an assurance has been obtained. Opp. 25. This means that the refugees must have some other qualifying relationship independent of the assurance. It makes no sense to exempt the roughly 24,000 refugees for whom assurances exist from the Order based on the happenstance that they had reached a later stage of the administrative process in which the government routinely obtained an assurance. In both cases, the refugees' relationship to a U.S. entity is the same: they have none. The only difference is that for the 24,000 refugees, the government has entered into a services contract with a refugee-resettlement agency.

B. The Government Properly Construed "Close Familial Relationship"

1. Respondents' submission (Opp. 27-35) similarly confirms the unreasonableness of the district court's broad reading of qualifying family relationships. This Court expressly limited the injunctions to "close familial relationship[s]," not every relative. IRAP, slip op. 12. And it explained that "[t]he facts

of these cases" -- which involve a spouse (of Doe #1 in No. 16-1436), and a mother-in-law (of Dr. Elshikh in No. 16-1540) whose U.S.-citizen daughter also resides in the United States -- "illustrate the sort of relationship that qualifies." Ibid. The government's interpretation of close family members, grounded in the INA, faithfully implements that direction. Gov't Mot. 25-36

Respondents' position, in contrast, presents a caricature of the standard this Court established. By their lights, in cabining the injunctions to "close familial relationship[s]," this Court carved out only "distant family members, such as second-cousins and great-aunts" (as well as "non-familial associates"). Opp. 29. Nothing in this Court's decision suggests that it had such an expansive definition of "close famil[y]" members in mind, or that it meant Section 2(c) to remain inoperative except for aliens who lack even a U.S. uncle, cousin, or sister-in-law.

Respondents suggest (Opp. 28) that in some circumstances, a U.S. person may have especially close ties to such distant relations. There is no reason, however, to assume categorically that every relative covered by their reading has such a connection. A U.S. citizen whose foreign-national sister marries an alien abroad may have never met that brother-in-law. Respondents cannot explain why this Court's stay ruling should be skewed to exempt that brother-in-law from the Order's provisions.

2. Respondents also resist (Opp. 30-34) the government's reliance on the INA provisions in implementing this Court's

standard of a "close familial relationship." But given the Court's language echoing the Order's waiver provision for "close family member[s]," Order § 3(c)(iv); see IRAP, slip op. 11-12 -- which in turn reflects lines drawn by Congress in the INA -- and given the need to draw some distinctions among family members, it was wholly reasonable for the government to follow the framework Congress created in the INA. Gov't Mot. 26-29. As the government has shown, the Court's reference to Dr. Elshikh's mother-in-law does not undermine that sound approach. Id. at 35.

Like the district court, respondents also attempt (Opp. 32-34) to cobble together a broader definition of close family members based on other, inapposite statutory and regulatory provisions and case law from other contexts. Even the authorities they cite lend them no support.[2] More fundamentally, respondents fail to refute the government's showing that the most relevant statutory provisions -- which govern which relatives may petition for a visa for a relative -- support the government's

---

[2] For example, the description of certain relatives as "close family members" that they quote (Opp. 32 (brackets and citation omitted)) in connection with 8 U.S.C. 1183a(f)(5) comes not from the statute, but from a committee report. H.R. Rep. 127, 107th Cong., 1st Sess. 2 (2001). And none of the other provisions they cite, including the statute addressing the Lautenberg Program, Pub. L. No. 101-167, 599D-599E, 103 Stat. 1261-1264 (1989), uses the term "close family member." Indeed, as respondents' description of them makes clear (Opp. 32), a relationship to a more distant relative is covered only if a parent or more immediate family member has died or some other context-specific contingency is satisfied.

interpretation. The government's reliance on those provisions is far more reasonable than respondents' freeform approach.

III. THIS COURT SHOULD STAY THE DISTRICT COURT'S MODIFIED INJUNCTION PENDING CONCLUSIVE RESOLUTION BY THIS COURT OR THE COURT OF APPEALS

For the reasons set forth in the government's motion, the Court should temporarily stay the district court's modified injunction while the Court considers and decides the merits of these issues. Gov't Mot. 36-40. At a minimum, if and to the extent the Court determines that some or all of these issues should be addressed by the court of appeals in the first instance, it should grant a stay pending the disposition of the government's protective appeal and any subsequent proceedings in this Court. Requiring the government to adhere to the district court's erroneous ruling during the pendency of potentially protracted lower-court litigation would only compound the confusion and uncertainty the district court's ruling is already creating.

Respondents offer no valid reason why the government should be required to implement that modified injunction based on the district court's misreading of this Court's stay ruling while the correctness of that court's interpretation is adjudicated. Their claim (Opp. 36) that this Court has "already found that the balance of the harms counsels against a stay" is wrong. This Court granted a stay; the only question is its scope. Respondents also suggest (Opp. 37) that leaving the district court's misguided decision in place would minimize disruption by preventing multiple changes.

But permitting the government to resume orderly implementation of this Court's stay ruling, as it had done until July 13, would be far less disruptive than halting that implementation for an unknown period pending further litigation, only to resume implementation days, weeks, or even months later if the government's position prevails.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

JULY 2017

No. 16-1540 (16A1191)

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

STATE OF HAWAII, ET AL.

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **REPLY IN SUPPORT OF MOTION FOR CLARIFICATION OF JUNE 26, 2017, STAY RULING AND APPLICATION FOR TEMPORARY ADMINISTRATIVE STAY OF MODIFIED INJUNCTION**, via email and first-class mail, postage prepaid, this 18th day of July, 2017.

[See Attached Service List]

Jeffrey B. Wall
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001

July 18, 2017

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Supervisory Case Management Specialist, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

RECEIVED
JUL 19 2017
OFFICE OF THE CLERK
SUPREME COURT U.S.

16-1540
TRUMP, DONALD J., PRESIDENT OF THE UNITED STATES, ET AL.
HAWAII, ET AL.

MARK A. ARONCHICK (Mailed)
HANGLEY,ARONCHICK,SEGAL & PUDLIN
ONE LOGAN SQUARE
18TH & CHERRY STREETS
27TH FLOOR
PHILADELPHIA, PA 19103
215-568-6200
MARONCHICK@HANGLEY.COM

RICHARD D. BERNSTEIN (Mailed)
WILLKIE FARR & GALLAGHER LLP
1875 K STREET, NW
WASHINGTON, DC 20006
202-303-1000
RBERNSTEIN@WILLKIE.COM

DOUGLAS S. CHIN (Mailed)
ATTORNEY GENERAL
STATE OF HAWAII
425 QUEEN STREET
HONOLULU, HI 96813
808-568-1500
HAWAIIAG@HAWAII.GOV

BRIANNE J. GOROD (Mailed)
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18TH STREET, NW
SUITE 501
WASHINGTON, DC 20036
202-296-6889
BRIANNE@THEUSCONSTITUTION.ORG

MARC A. HEARRON (Mailed)
MORRISON & FOERSTER LLP
2000 PENNSYLVANIA AVE., N.W.
WASHINGTON , DC 20006
202-887-1500
MHEARRON@MOFO.COM

MARIKO HIROSE (Mailed)
INTERNATIONAL REFUGEE ASSISTANCE
PROJECT
40 RECTOR STREET
9TH FLOOR
NEW YORK, NY 10006
646-459-3044
MHIROSE@REFUGEERIGHTS.ORG

OMAR C. JADWAT (E-Mail)
AMERICAN CIVIL LIBERTIES UNION
125 BROAD ST.
18TH FLOOR
NEW YORK, NY 10004-2400
212-549-2620
OJADWAT@ACLU.ORG
212-549-2654(Fax)

LAWRENCE J. JOSEPH (Mailed)
1250 CONN. AVE., NW
#200
WASHINGTON, DC 20036
202-355-9452
LJ@LARRYJOSEPH.COM

ROBERTA A. KAPLAN (Mailed)
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
1285 AVENUE OF THE AMERICANS
NEW YORK, NY 10019-6064
212-373-3000
RKAPLAN@PAULWEISS.COM

NEAL KUMAR KATYAL (E-Mail)
HOGAN LOVELLS US LLP
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004
202-637-5600
NEAL.KATYAL@HOGANLOVELLS.COM

HAROLD HONGJU KOH (Mailed)
RULE OF LAW CLINIC YALE LAW SCHOOL
NATIONAL LITIGATION PROJECT
YALE LAW SCHOOL
127 WALL ST.
NEW HAVEN, CT 06511
203-432-1660
HAROLD.KOH@YALE.EDU

MARY KELLY PERSYN (Mailed)
PERSYN LAW & POLICY
912 COLE STREET PMB 1234
SAN FRANCISCO , CA 94117
628-400-1254
MARYKELLY@PERSYNLAW.COM

STUART A. RAPHAEL (Mailed)
OFFICE OF THE VIRGINIA ATTORNE
GENERAL
202 NORTH NINTH STREET
RICHMOND, VA 23219
804-786-7240
SRAPHAEL@OAG.STATE.VA.US

MARK J. RIENZI (Mailed)
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVENUE, NW
SUITE 700
WASHINGTON , DC 20036
202-955-0095
MRIENZI@BECKETFUND.ORG

JOSHUA DAVID ROGACZEWSKI (Mailed)
MCDERMOTT WILL & EMERY
THE MCDERMOTT BUILDING
500 NORTH CAPITOL STREET, NW
WASHINGTON, DC 20001-1531
202-758-8195
JROGACZEWSKI@MWE.COM

JAY ALAN SEKULOW (Mailed)
AMERICAN CENTER FOR LAW AND JUSTICE
201 MARYLAND AVE., NE
WASHINGTON, DC 20002
202-546-8890
SEKULOW@ACLJ.ORG

BARBARA D. UNDERWOOD (Mailed)
NY STATE OFFICE OF THE ATTORNEY
GENERAL
120 BROADWAY, 25 FLOOR
NEW YORK , NY 10271-0332
212-416-8016
BARBARA.UNDERWOOD@AG.NY.GOV

MOTION FILED
AUG - 7 2017

FILE COPY

No. 16-1540 (16A1191)

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Applicants,

v.

STATE OF HAWAII, *et al.*,
Respondents.

RESPONDENTS' MOTION FOR LEAVE TO ADD PARTY JOHN DOE

DOUGLAS S. CHIN
Attorney General of the State of Hawaii
CLYDE J. WADSWORTH
Solicitor General of the State of Hawaii
DEIRDRE MARIE-IHA
DONNA H. KALAMA
KIMBERLY T. GUIDRY
ROBERT T. NAKATSUJI
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL,
STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

Counsel for the State of Hawaii

NEAL KUMAR KATYAL*
COLLEEN ROH SINZDAK
MITCHELL P. REICH
ELIZABETH HAGERTY
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com
**Counsel of Record*

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

SARA SOLOW
ALEXANDER B. BOWERMAN
HOGAN LOVELLS US LLP
1735 Market St., 23rd Floor
Philadelphia, PA 19103

Counsel for Respondents

August 7, 2017

Respondents file this motion pursuant to Rule 21 of this Court to request leave to add John Doe as a party. Mr. Doe would join the State of Hawaii and Dr. Ismail Elshikh as Respondents in No. 16-1540.

On July 16, 2017, following the grant of certiorari, Dr. Elshikh's mother-in-law received a visa to come to the United States. She has now booked her travel and is scheduled to arrive in the country on August 12, 2017. Although this development should not affect Dr. Elshikh's standing, Respondents file this motion in an abundance of caution to ensure that any new questions of justiciability do not foreclose the Court from reaching the merits in this important case. Like Dr. Elshikh, Mr. Doe is a Muslim-American and a Hawaii resident personally affected by the Order: Mr. Doe's son-in-law is a national of one of the six countries designated by Section 2(c), and he applied for an immigrant visa before the Order was executed. But unlike Dr. Elshikh's mother-in-law, Mr. Doe's son-in-law has not yet received a visa. That is, Mr. Doe is in precisely the same situation with respect to his son-in-law that Dr. Elshikh was in with respect to his mother-in-law when this Court granted certiorari.

Mr. Doe seeks the same relief as Dr. Elshikh and will present no new arguments on the merits. Granting Respondents' motion will merely preserve the abilities Respondents possessed at the time certiorari was granted to make their claims, while causing no prejudice to the Government. Respondents notified the Government of their intent to file this motion, and the Government stated that it opposes the motion.

I. Mr. Doe's Addition as a Party is Warranted Under this Court's Decisions in *Mullaney* and *NFIB*.

This Court's standard for adding parties to a pending case is well settled. In *Mullaney* v. *Anderson*, the Court granted leave to the respondents to add two new parties after certiorari had been granted and the merits case was being briefed. 342 U.S. 415 (1952). The "standing of respondent union and its Secretary-Treasurer to maintain this suit" had come into "question[]," and "[t]o remove the matter from controversy" and ensure that the Court could reach the question presented, the Court permitted the union to "add as parties plaintiff two of its members." *Id.* at 416-417. In granting the motion, the Court noted that (1) "the addition of these two parties plaintiff" would "in no wise embarrass" the opposing party; (2) the "earlier joinder" of the parties would not "have in any way affected the course of the litigation"; and (3) "[t]o dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration." *Id.* at 417; *see also Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 833-834 & n.8 (1989) (reaffirming *Mullaney*'s analysis and referring to it as an instance where the Court "exercised" its "authority" to ensure "the existence of a justiciable case").

This Court granted a similar motion to add parties just a few years ago, in *National Federation of Independent Business ("NFIB")* v. *Sebelius*, after changed circumstances in the personal life of one of the parties potentially injected a new standing issue into the case. 565 U.S. 1154 (2012). Following the grant of certiorari in *NFIB*, but before the merits briefs were filed, one of the petitioners, Ms. Brown,

filed for bankruptcy and was forced to close her business. *See* Unopposed Motion for Leave to Add Parties Dana Grimes and David Klemencic, *Nat'l Fed. of Indep. Bus.* v. *Sebelius* 2-3, Nos. 11-393, 11-398, 11-400 (filed Jan. 4, 2012). Ms. Brown was a member of the National Federation of Independent Business and a small business owner, and her assertion of standing had turned on the impact of the healthcare law on her business. Although the court of appeals held that both NFIB as an organization and Ms. Brown as an individual had standing to bring their claims, petitioners sought to "pretermit any possible standing concerns arising from [the] recent change in the circumstances of Ms. Brown" and sought leave to add two new parties. *Id.* at 1. The proposed new parties were similarly situated to Ms. Brown: Both were small business owners and members of NFIB, and each had "participated in the litigation . . . in the district court" by filing declarations in support of NFIB's associational standing. *Id.* at 3.

The *NFIB* petitioners contended that the addition of the new parties was "appropriate" under *Mullaney* because it would simply prevent Ms. Brown's changed circumstances from imperiling the Court's jurisdiction, while causing no prejudice to the Government. *Id.* at 4. Pointing to the factors articulated by the Court in *Mullaney*, the petitioners demonstrated: First, that adding the proposed parties would "in no wise embarrass" the Government, given that both small business owners had filed declarations in the district court and their claims of standing were "materially indistinguishable" from Ms. Brown's before she filed for bankruptcy, *id.* at 3-5; second, that the earlier joinder of the parties "would not have

'in any way affected the course of the litigation'"; and third, that if "standing concerns" pertaining to Ms. Brown prevented the Court from reaching the merits, it would require plaintiffs to "'start over in the District Court'" and thereby "'entail needless waste and run[] counter to effective judicial administration.'" *Id.* at 5 (citing *Mullaney*, 342 U.S. at 416-417 (alteration in original)). Based on these considerations and without issuing an opinion, the Court granted the petitioners' motion. *NFIB*, 565 U.S. at 1154.

These cases are not the only relevant examples. This Court has drawn on similar principles to those expounded in *Mullaney* and applied in *NFIB* in granting other motions to add parties or to intervene, both at the petition and merits stages, to avoid newly presented standing questions from potentially jeopardizing a case. *See Gonzales* v. *Oregon*, 546 U.S. 807, 807 (2005) (granting motion to intervene filed by terminally-ill patients, to alleviate potential mootness issues after eleven of the original patient-respondents died); 1A West's Fed. Forms, Supreme Court § 315 (5th ed.) (ninth example) (providing excerpts from *Gonzales* intervention motion); *Rogers* v. *Paul*, 382 U.S. 198, 198-199 (1965) (granting motion to add two students as parties, after one of the original plaintiffs had graduated and another entered his final school year); *cf. Banks* v. *Chicago Grain Trimmers Ass'n, Inc.*, 389 U.S. 813, 813 (1967) (granting spouse of deceased's motion to intervene to petition the court to review the denial of his death benefits).

Mullaney, *NFIB*, and these further examples demonstrate that the addition of Mr. Doe is appropriate in this case. Permitting the addition of Mr. Doe would in

no way "embarrass" or prejudice the Government. His addition is designed merely to preserve the status quo in this litigation that has existed since Respondents filed their First Amended Complaint on February 13, 2017. *See* Dist. Ct. Dkt. 37. Since that time, the case has featured a plaintiff who—among other things—has a family member who would be subject to Section 2(c), if that provision were allowed to go into full force. Therefore, the Government has consistently focused its briefing with respect to jurisdiction on the standing of an individual plaintiff with a family member who could be excluded by Section 2(c). Permitting Mr. Doe to enter ensures that those arguments remain relevant; it does not introduce any new jurisdictional issues with which the Government must grapple.

Indeed, Mr. Doe is a precise substitute for Dr. Elshikh in this respect. When Respondents filed their Second Amended Complaint on March 8, 2017, challenging the President's revised Order of March 6, 2017, Dr. Elshikh represented that his mother-in-law was a national of one of the six countries designated by Section 2(c) of the Order (Syria), that she had an active application for an immigrant visa which was filed in September 2015, and that days earlier, their family was informed by the National Visa Center that her application was "proceeding to the next stage of the process" and would soon involve an interview. Dist. Ct. Dkt. 66-1, ¶ 4 (Decl. of Ismail Elshikh).

Mr. Doe's present circumstances are nearly identical: Mr. Doe's son-in-law is a national of one of the six countries designated by Section 2(c) of the Order (Yemen), he has a pending application for an immigrant visa which was filed

(coincidentally) in September 2015, and just recently, Mr. Doe's family was informed by the U.S. Citizenship and Immigration Service that his son-in-law's visa application had "clear[ed]" the first stage of the process and was proceeding towards the interview stage. *See* Decl. of John Doe, ¶¶ 4, 7, 8, 9 (attached hereto as Exhibit A).

Allowing Mr. Doe to join as a party would thus place Respondents, collectively, in a position analogous to that which they were in when they initiated this litigation. *Cf.* Gov't Supp. Mem. in Support of App. for Stay Pending Appeal 9-10, *Trump* v. *Hawaii*, No. 16A1191 (filed June 15, 2017) (contending that the proper standing inquiry looks to the standing of the parties "at the commencement of the action"). This would mitigate any unfairness that the passage of time—coupled with the District Court's injunction—would have on Respondents' abilities to present their claims, while presenting no new arguments on the merits.

Mullaney's remaining considerations concerning the addition of parties are also satisfied: Adding Mr. Doe as a party before this point in time would not have "affected the course of the litigation," whereas "dismiss[ing] the present petition" could cause "needless waste" of judicial resources. *Mullaney*, 342 U.S. at 417. It would not have affected the case or any arguments presented to date had Mr. Doe been joined as a formal party earlier because Mr. Doe's standing to challenge the Order as well as the injuries he suffers from it are wholly redundant of those claimed by Dr. Elshikh. *See supra*, at 1, 4-6. It is only *now*—at the current stage of this litigation—that Mr. Doe's joinder has become appropriate because Dr. Elshikh's

mother-in-law has received her visa and is scheduled to enter the country on August 12. Meanwhile, were this Court to deny Respondents' motion, it might unnecessarily introduce an entirely new standing issue into the case. In the extremely unlikely event that this particular standing issue was resolved against Respondents, it would "require the new plaintiffs to start over in the District Court." *Mullaney*, 342 U.S. at 417. That unquestionably would "run[] counter to effective judicial administration," given the extensive briefing and the lengthy opinions that have been authored in this case to date. *See id.*; *see also NFIB*, 565 U.S. at 1154; *Rogers*, 382 U.S. at 198-199.

Finally, Mr. Doe has already been involved in this suit, meaning that his presence will not inject wholly new facts that were not before the District Court. As was true of the proposed new parties in *NFIB*, Mr. Doe was a declarant in the District Court proceedings below. In early February 2017, when the State of Hawaii filed its first complaint challenging the precursor to the current Executive Order, the State submitted three declarations filed by John Doe declarants along with its motion for a temporary restraining order ("TRO"). Dist. Ct. Dkts. 10-1, 10-2, 10-3. As Hawaii explained in its submission of these declarations, each declarant was a resident of the State of Hawaii, and each described how the original Executive Order directly and personally affected their lives as well as their families. *See* Dist. Ct. Dkt. 10, ¶¶ 4-6 (submitting the redacted Doe declarations along with the TRO motion, original copies of which were provided to the District Court for in camera review); Dist. Ct. Dkts. 15 & 15-1, ¶ 4 (requesting in camera review). Mr.

Doe was one of those declarants, and his in camera statement explained how his son-in-law was a national of one of the then-seven designated countries, had applied for an immigrant visa, and would be banned from entering the country under the plain terms of the Order. *See* Ex. B (Mr. Doe's in camera District Court declaration, with his name and signature redacted). Mr. Doe's current attestations about the revised Order's effects on his family are substantively identical. *See* Ex. A.[1]

II. This Court Should Allow Mr. Doe to Proceed Anonymously.

Respondents respectfully request that this Court allow Mr. Doe to proceed as an anonymous party in this Court, in order to protect his and his families' identities. Respondents have therefore attached to this publicly-filed motion Mr. Doe's present declaration, dated August 3, 2017, with his name omitted and his signature redacted. Respondents will also submit to the Clerk's Office, for in camera review, an original, unredacted copy of Mr. Doe's present declaration bearing his name, as well as a copy of Mr. Doe's declaration that was provided to the District Court for review in camera, also bearing his name and signature.

---

[1] At the time that the State of Hawaii filed its complaint and motion for a temporary restraining order as to the first Executive Order in February 2017, Mr. Doe was willing to participate in the suit, to submit a declaration for the District Court's in camera review, and to have the general allegations of his declaration be described in public documents accompanying his filing. *See* Dist. Ct. Dkts. 10, 10-1, 15 & 15-1. At that time, however, Mr. Doe was not willing to have the full content of his declaration made available to the public. Litigation against the Executive Order was still in its earliest stages, the first Order was in operation, and there was considerable uncertainty and fear about retaliation. *See* Dist. Ct. Dkt. 15, at 8-9. Mr. Doe is now prepared for the content of his declaration to be disclosed to the public, so long as his name and signature remain concealed from public view. *See* Part II, *infra*.

As Mr. Doe attests, he wishes to proceed anonymously because he is "afraid that if [he] identifies himself], it could delay [his] son-in-law's visa application" or cause himself, his wife, or his children to be "subject to public reprisals." Ex. A ¶ 14. Two of Mr. Doe's children "are still very young," and he believes they "should not have to face such consequences." *Id.* Mr. Doe's fears of reprisals are all the more heightened given the small size and close-knit nature of Hawaii's Muslim community. Moreover, Mr. Doe has seen how Dr. Elshikh—the imam of his mosque—has been subjected to additional media attention, criticism, and even false accusations, as a result of his public participation in this lawsuit.

This Court has permitted parties to proceed under pseudonyms in many prior cases. *E.g.*, *Roe* v. *Wade*, 410 U.S. 113 (1973); *Poe* v. *Ullman*, 367 U.S. 497, 498 n.1 (1961). Indeed, several of the parties in the consolidated *IRAP* case currently are proceeding under pseudonyms. While there is no Supreme Court rule that speaks to a party's joinder in this Court under a pseudonym, the practice is widely permitted in the lower federal courts to protect parties' privacy. *E.g.*, U.S. Dist. Ct. for the Dist. of Hawaii Local Rule 10.2(f) (permitting parties to file papers "in camera"); *M.M.* v. *Zavaras*, 139 F.3d 798, 802-803 (10th Cir. 1998) (discussing examples of district courts allowing parties to proceed under assumed names); *see also International Union* v. *Scofield*, 382 U.S. 205, 217 n.10 (1965) (recognizing that "the policies underlying" the rules and practices in the lower federal courts "may [also] be applicable in appellate courts"); *Newman-Green*, 490 U.S. at 832 (same). Moreover, in this case, the Government never filed any opposition to Respondents'

motion for in camera review of the Doe declarations, Dist. Ct. Dkt. 15, which the District Court granted for "good cause" shown, Dist. Ct. Dkt. 29. This Court should draw upon the rules and practices that have been developed in the lower courts to permit parties to proceed under fictitious names, and allow Mr. Doe to proceed anonymously here.

Respectfully submitted,

/s/ Neal Kumar Katyal
NEAL KUMAR KATYAL*
COLLEEN ROH SINZDAK
MITCHELL P. REICH
ELIZABETH HAGERTY
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com
*Counsel of Record

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

SARA SOLOW
ALEXANDER B. BOWERMAN
HOGAN LOVELLS US LLP
1735 Market St., 23rd Floor
Philadelphia, PA 19103

Counsel for Respondents

DOUGLAS S. CHIN
Attorney General of the State of Hawaii
CLYDE J. WADSWORTH
Solicitor General of the State of Hawaii
DEIRDRE MARIE-IHA
DONNA H. KALAMA
KIMBERLY T. GUIDRY
ROBERT T. NAKATSUJI
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL,
STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

Counsel for the State of Hawaii

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Neal Kumar Katyal, a member of the Supreme Court Bar, hereby certify that one copy of the foregoing Motion for Leave to Add Party John Doe was served via electronic mail and Federal Express on August 7, 2017 on:

JEFFREY B. WALL
Acting Solicitor General
U.S. DEPARTMENT OF JUSTICE
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217
Counsel for Applicants

/s/ Neal Kumar Katyal
Neal Kumar Katyal

EXHIBIT A

DECLARATION OF JOHN DOE

I, JOHN DOE, declare as follows:

1. I was originally born in Yemen and am a naturalized U.S. citizen. I have lived in Hawaii for almost 30 years.

2. My wife and all four of my children are U.S. citizens as well, either born in the United States or naturalized. Two of my children are under the age of 14.

3. We are all Muslims, and are members of the mosque where Dr. Ismail Elshikh is imam.

4. One of my daughters is married to a young man from Yemen.

5. They have a young toddler child, who was born in Hawaii and is also a U.S. citizen.

6. My son-in-law fled Yemen to escape the civil war and eventually ended up in Malaysia. My daughter and their child, for the past year and a half have had to go back and forth between Hawaii and Malaysia just to see him.

7. In September 2015, my daughter filed a petition to allow my son-in-law to immigrate to the United States as the spouse of a U.S. citizen.

8. In the summer of 2016, my daughter had an interview with immigration officials for her husband's visa application. They told her that she had completed all the necessary paperwork and would e-mail her if they needed anything else.

9. In late June 2017, my daughter was informed by the U.S. Citizenship and Immigration Services that my son-in-law's immigrant visa application had successfully passed through the clearance stage. The next step is for them to complete his paperwork, and for my son-in-law to then receive an interview at a U.S. embassy overseas. My daughter's attorney estimates that my son-in-law will receive a visa within the next three to twelve months.

10. The issuance of the Executive Order in March 2017 banning entry of the citizens of six predominantly Muslim countries (including Yemen) creates great uncertainty as to whether my son-in-law will be able to come to Hawaii.

11. The rest of my family and I miss my son-in-law very much. We want only to be able to live in Hawaii with my daughter, her husband, and our grandchild, as one big family.

12. I have worked hard to build a life in Hawaii and to become a part of this community.

13. The Executive Order, were it not enjoined, would ban my son-in-law from immigrating to the United States and moving to Hawaii simply because he is of Yemeni descent—because he is a national of a Muslim-majority country. The moment it takes effect, the Order will divide up my family across the world, and prevent my wife and I, as well as our other children, from sharing our daily lives with our daughter, son-in-law, and grandchild. We are a close family, and we are proud

American citizens and Hawaii residents. It is hard not to feel that the Order, in its entirety, discriminates against us—and imposes a concrete hardship upon our family that our neighbors do not have to experience—simply because we are Muslim and because my daughter has married a Muslim from a Muslim-majority country. That is unfair, and it is not right.

14. I have asked my attorney to file this declaration anonymously because I am afraid that if I identify myself, it could delay my son-in-law's visa application even further. Our family's ability to reunify is based entirely this process. I am also afraid that I, my wife, or my children may be subject to public reprisals if my name is publicized. Two of my children who live at home are still very young and should not have to face such consequences.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, **August 4, 2017.**

[redacted]

JOHN DOE

EXHIBIT B

DECLARATION OF [redacted]

I, [redacted], declare as follows:

1. Although I was originally born in Yemen, I am a naturalized U.S. citizen and have lived in Hawaii for 29 years.

2. My wife and all four of my children are U.S. citizens as well, either born in the United States or naturalized.

3. I am a carpenter by trade and also a licensed contractor.

4. My elder daughter is married to a young man from Yemen.

5. They have a one-year-old daughter, who was born in Hawaii and is also a U.S. citizen.

6. My son-in-law fled Yemen to escape the civil war and eventually ended up in Malaysia. My daughter and granddaughter are now with him in Malaysia.

7. In September 2015, my daughter filed a petition to allow my son-in-law to immigrate to the United States as the spouse of a U.S. citizen.

8. In June 2016, my daughter came back to the United States for an interview with immigration officials. They told her that she had completed all the necessary paperwork and would e-mail her if they needed anything else.

9. As far as the family knew, it appeared that my daughter's petition filed on behalf of my son-in-law was progressing well.

10. However, the issuance of the Executive Order banning entry of the citizens of seven predominantly Muslim countries (including Yemen) has created great uncertainty as to whether my son-in-law will be able to come to Hawaii and I believe it is hindering my family's efforts to reunify.

11. The rest of my family and I miss my granddaughter, daughter, and son-in-law very much.

12. I have worked hard to build a life in Hawaii and become a part of this community.

13. I believe that this Executive Order, due to its effect on my son-in-law's efforts to come to Hawaii, is dividing my family and causing us great harm.

I declare the foregoing to be true and correct under penalty of perjury.

DATED: Honolulu, Hawaii, February 2, 2017.



Supreme Court, U.S.
FILED
JUN 15 2017
OFFICE OF THE CLERK

No. 16A1191

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
APPLICANTS

v.

STATE OF HAWAII, ET AL.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF APPLICATION FOR STAY PENDING APPEAL AND PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 16A1191

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., APPLICANTS

v.

STATE OF HAWAII, ET AL.

SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF APPLICATION FOR STAY PENDING APPEAL AND PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

On June 1, 2017, applicants President Donald J. Trump et al. sought a stay of the preliminary injunction pending appeal to the Ninth Circuit and any further proceedings in this Court. The government noted that the Court could construe the stay application as a petition for a writ of certiorari before judgment and grant review in this case and in Trump v. IRAP, No. 16-1436. Stay Appl. 6, 17. Respondents agreed that if the Court grants certiorari in IRAP, it should "grant certiorari" in this case as well "so that the cases may be heard together." Opp. 3.

On June 12, 2017, the court of appeals issued its decision affirming in part and vacating in part. Supplemental Addendum (Supp. Add.) 1-78. The court overturned certain portions of the injunction involving internal-review procedures, but it upheld the

remainder -- based not on the Establishment Clause rationale the district court had adopted, but on statutory grounds. That ruling cements the need for this Court's review and for a stay. The government therefore respectfully requests that the Court construe its stay application as a petition for a writ of certiorari, grant certiorari so that this case may be considered in tandem with IRAP, and stay the remaining portions of the injunction pending the final disposition of the case.

Although the court of appeals correctly vacated aspects of the injunction, the portions it left in place still nullify a national-security directive of the President and still sweep much further than the injunction in IRAP. And although the court did not adopt respondents' Establishment Clause rationale, it relied instead on even more novel and extraordinary statutory grounds. Indeed, it principally held that courts may second-guess the President's assessment of the national interest under 8 U.S.C. 1182(f) -- a position that respondents themselves did not advance below. By preventing the President from effectuating his national-security judgment, the injunction will continue to cause irreparable harm to the government and the public. The injunction should be stayed, and certiorari should be granted.

STATEMENT

The court of appeals expressly declined to reach respondents' Establishment Clause challenge to Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order). Supp. Add. 15. It

addressed only whether the Order complies with the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq. Supp. Add. 16-60. The court held that Dr. Elshikh and Hawaii have standing to challenge Sections 2 and 6, their claims are ripe and fall within the zone of interests protected by the statute, and their claims are not barred by consular nonreviewability. Id. at 16-32.

On the merits, the court of appeals primarily held that three provisions -- Section 2(c)'s 90-day suspension of entry of nationals from six countries, Section 6(a)'s 120-day suspension of adjudications and travel under the U.S. Refugee Admission Program, and Section 6(b)'s reduction of the maximum number of refugees who may be admitted in Fiscal Year 2017 -- likely exceed the President's authority under 8 U.S.C. 1182(f). Supp. Add. 33-48. The court acknowledged that the President has authority under Section 1182(f) to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants" "[w]henever the President finds that" such entry "would be detrimental to the interests of the United States." Id. at 34 (quoting 8 U.S.C. 1182(f)). But it concluded that "[t]here is no sufficient finding in [the Order] that the entry of the excluded classes would be detrimental to the interests of the United States." Id. at 36.

The court of appeals also held that Section 2(c) likely violates 8 U.S.C. 1152(a)(1)(A), which bars "discriminat[ing]" or granting a "preference or priority" in the "issuance of an immigrant visa because of," inter alia, an alien's "nationality."

See Supp. Add. 48. The court held that, although Section 1152(a)(1)(A) addresses only issuance of visas, it also "cabins the President's authority under [Section] 1182(f)" to restrict entry of aliens. Id. at 52; see id. at 48-56. And although Section 1152(a)(1)(A) does not address nonimmigrant visas, the court declined to limit the injunction to immigrant visas. Id. at 73 n.24.

In addition, the court of appeals held that Section 6(b)'s lowering of the refugee cap for Fiscal Year 2017 to 50,000 violates 8 U.S.C. 1157. Supp. Add. 56-60; see id. at 47 n.18 (noting that as of May 31, 2017, 46,403 refugees had been admitted in Fiscal Year 2017). Section 1157 authorizes the President, in consultation with congressional leadership, to establish at the start of each fiscal year the maximum number of refugees who may be admitted. The court held that the President could not direct that a lower number be permitted to enter. Id. at 56-60.

The court of appeals also held that respondents are likely to suffer irreparable harm that is not outweighed by the injury to the government, and that the public interest supports an injunction. Supp. Add. 63-69. The court further declined to limit the injunction to respondents themselves. Id. at 73-75. The court held, however, that the district court had abused its discretion in enjoining "the internal review procedures" of Sections 2 and 6 and in enjoining the President himself. Id. at 69-72, 76. The court denied the government's request for a stay. Id. at 78 n.25.

ARGUMENT

The court of appeals' decision confirms that certiorari and a stay are warranted. First, the decision below upholds an injunction barring enforcement of a national-security directive of the President, based on an unprecedented view of the President's authority over the Nation's borders and on the court of appeals' overt disagreement with his assessment of national-security risks. Second, there is at the very least a fair prospect that this Court will reverse the court of appeals' decision and vacate the injunction in whole or in part. Like respondents' Establishment Clause claim, their statutory challenges are both nonjusticiable and meritless. Third, the injunction, even as modified, will continue to cause irreparable injury to the government and the public, and it is not necessary to redress any irreparable injury to respondents. At a minimum, the injunction impermissibly extends far beyond redressing any cognizable harm to respondents.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI

Respondents have not seriously disputed that the questions presented by this case warrant review. Stay Appl. 18-19. Even before the Ninth Circuit's ruling, respondents "d[id] not dispute the fundamental importance of the underlying legal issues" presented, including "the statutory and constitutional limits of Executive power." Opp. 11. And they agreed (Opp. 3, 40) that, if the Court grants review in Trump v. IRAP, No. 16-1436, it also

should grant certiorari in this case and consider both cases together.

Now that the Ninth Circuit has upheld injunctive relief even broader than the injunction in IRAP, there is no doubt that review is appropriate. Even as narrowed by the court of appeals, the injunction here nullifies multiple provisions of an Executive Order issued by the President pursuant to his inherent and express statutory authority to safeguard national security. In addition to Section 2(c)'s 90-day suspension of entry, the decision below upholds injunctive relief against Section 6(a)'s 120-day suspension of the Refugee Program, as well as Section 6(b)'s reduction in the maximum number of refugees who may enter in Fiscal Year 2017, a provision respondents never specifically challenged in seeking a temporary restraining order (TRO).

Moreover, the Ninth Circuit did not enjoin those provisions based on the Establishment Clause, as the district court here and the Fourth Circuit in IRAP did. Instead, it held that the President exceeded his express authority to suspend entry of aliens abroad under 8 U.S.C. 1182(f), because in the court's view the President's factual findings were not sufficient to justify the temporary suspension. Supp. Add. 35-46. Respondents themselves did not press that theory in the court of appeals, and to the government's knowledge, no court has ever adopted it. That holding sweeps far beyond the circumstances of this case, and if left

undisturbed it threatens to hamstring the Executive in safeguarding the Nation's borders.

II. THERE IS A FAIR PROSPECT THAT THIS COURT WILL SET ASIDE THE DECISION BELOW

Respondents' statutory claims are not justiciable and are meritless. And their opposition does nothing to rehabilitate their Establishment Clause claim that the court of appeals did not reach.

A. Respondents' Statutory Claims Are Not Justiciable

1. At the outset, respondents' statutory challenges are foreclosed by the general rule barring judicial review of the denial of entry to aliens abroad. See Saavedra Bruno v. Albright, 197 F.3d 1153, 1158-1160 (D.C. Cir. 1999) (collecting cases). This Court has twice undertaken review, albeit under a highly deferential standard, when a U.S. citizen asserted that exclusion of an alien violated the citizen's own constitutional rights, but that limited exception does not encompass statutory claims. See Stay Appl. 20-21; Cert. Reply Br. at 10, Trump v. IRAP, No. 16-1436 (June 14, 2017) (IRAP Cert. Reply). The court of appeals cited no authority for permitting statutory challenges by U.S. citizens to the denial of entry to aliens abroad.[1]

[1] The Ninth Circuit cited two decisions of this Court, neither of which supports permitting review of statutory challenges here that Congress has not authorized. Supp. Add. 31. Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993), did not address reviewability, and it did not presume to question the President's determination to suspend entry of aliens under 8 U.S.C. 1182(f). Moreover, it held that the other statutory provision at issue did not "place[] any limit on the President's authority" to interdict Haitian immigrants. 509 U.S. at 187. And INS v. Chadha, 462 U.S.

The court of appeals also asserted that the general rule of nonreviewability applies only where a plaintiff "seek[s] review of an individual consular officer's decision to grant or to deny a visa pursuant to valid regulations," but not to "promulgation of sweeping immigration policy." Supp. Add. 30-31 (emphasis and citation omitted). A plaintiff cannot circumvent the preclusion of review, however, by bringing a premature suit contending that a ground on which a visa might be denied in the future is not permitted by the statute. Moreover, decisions to exclude aliens are "largely immune from judicial control" because the Constitution assigns "the power to expel or exclude aliens" to "the Government's political departments." Fiallo v. Bell, 430 U.S. 787, 792 (1977). The doctrine thus applies with the utmost force to decisions by the head of the Executive Branch.

2. Beyond this preclusion of review, neither Dr. Elshikh nor Hawaii has identified any cognizable injury traceable to the alleged statutory violations. Dr. Elshikh alleges that the Order sends a "message" (Opp. 14) condemning his religion, but that basis for his Establishment Clause claim has nothing to do with his statutory claim, and in any event is not even a cognizable injury. Pet. for Cert. at 17-20, Trump v. IRAP, No. 16-1436 (June 1, 2017) (IRAP Cert. Pet.). Contrary to the court of appeals' reasoning,

919 (1983), involved an alien who was already present in the United States, and addressed whether a procedure permitting one House of Congress to veto Executive deportation decisions complies with bicameralism and presentment.

Supp. Add. 18-19, Dr. Elshikh cannot assert injury based on a possible effect on mother-in-law's visa application: he is not her petitioner; his wife is, but she is not a party to this litigation. Stay Appl. Add. 46. And he has no injury from Section 6's refugee provisions: his mother-in-law seeks a visa, not refugee admission. Ibid.

That leaves only Dr. Elshikh's allegation that his mother-in-law might be delayed in entering the country. Supp. Add. 19-20. As the government has maintained from the outset, no such injury was imminent when the operative complaint was filed. D. Ct. Doc. 145, at 21-22 (Mar. 13, 2017). Respondents themselves now say that Dr. Elshikh's mother-in-law has been informed that processing of her visa application will likely extend until July 2017 -- well after the original 90-day suspension would have expired if it had not been enjoined. Opp. 14. Respondents' assertion (ibid.) that Section 2(c), "if it goes into effect, would block her entry into the United States" is beside the point. Standing is measured as of the commencement of the action. See Davis v. FEC, 554 U.S. 724, 732-733 (2008). Respondents cannot bootstrap their way into standing because they obtained an injunction that delayed the commencement of Section 2(c)'s suspension.

In any event, even assuming Dr. Elshikh's mother-in-law would ultimately be found otherwise eligible to obtain a visa, there is no final agency action, and his asserted injury is not ripe because his mother-in-law may obtain a waiver as a close family member who

seeks to reside with her daughter. Stay Appl. 21-22; Order § 3(c)(iv). The court of appeals deemed that prospect irrelevant because the "waiver is discretionary" and "[t]he waiver provision" does not "guarantee[] that waivers will be granted." Supp. Add. 29. That turns the justiciability analysis upside-down: the fact that Dr. Elshikh's claimed injury hinges on "contingent future events that may not occur," Texas v. United States, 523 U.S. 296, 300 (1998) (citation omitted), until a consular officer actually passes upon her visa and waiver application, means that his claim is not ripe.

Hawaii's claims fail for the same reasons. The only purported injuries to Hawaii on which the court of appeals relied are likewise speculative. The court held that the State's university system will be harmed as prospective students are unable to enter the country. Supp. Add. 20-23. But when it filed its complaint, Hawaii identified no student who would be delayed in entering. Gov't C.A. Br. 22-23. On appeal, Hawaii asserted -- based on new evidence -- that some graduate students have since received and accepted admission and would arrive in August 2017, long after the 90-day suspension would have expired but for the injunctions in this case and in IRAP. C.A. Doc. 307-2, ¶¶ 3-4 (May 19, 2017). These alleged post-complaint developments are irrelevant to standing. See p. 9, supra. Regardless, nothing in the INA

supports the notion that a public university has a cognizable right to compel the entry of an alien abroad in these circumstances.[2]

The court of appeals also held that Hawaii is harmed in "carrying out its refugee policies," which "hinders the exercise of its sovereign power to enforce its laws." Supp. Add. 23-24. Hawaii has no sovereign or other cognizable interest in regulating or compelling the entry of aliens abroad, because "[t]he authority to control immigration -- to admit or exclude aliens -- is vested solely in the Federal Government." Arizona v. United States, 567 U.S. 387, 409-410 (citation omitted); see Air Courier Conference v. American Postal Workers Union, AFL-CIO, 498 U.S. 517, 524 (1991). A State's "sovereign power over individuals and entities within [its] jurisdiction" and its corresponding "power to create and enforce a legal code," Supp. Add. 24 (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601 (1982)), does not extend to aliens abroad who have not first been admitted.

B. Respondents' Statutory Claims Are Meritless

1. Sections 2(c), 6(a), and 6(b) are consistent with 8 U.S.C. 1182(f)

The court of appeals' principal holding -- and the only ground that could support all remaining portions of the injunction -- is that Sections 2(c), 6(a), and 6(b) likely exceed the President's

[2] Nor can the court of appeals avoid the problem by concluding (Supp. Add. 22) that the Order is "deter[ring] prospective students": any such "chilling effect" is not "fairly traceable" to Section 2(c) absent identification of a student who would have been subject to the 90-day entry suspension when the complaint was filed. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1152 (2013).

suspension authority under 8 U.S.C. 1182(f) because, in the court's view, the President failed to make a sufficient finding of harm to the national interest. Supp. Add. 33-48. Respondents never advanced that novel theory in the court of appeals. Resps. C.A. Br. 26-42. And for good reason: it has no basis in the statute or historical practice, and it improperly disregards the Order's express findings.

a. Section 1182(f) provides in pertinent part:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. 1182(f). By its terms, Section 1182(f) grants the President exceedingly broad discretion, authorizing him to suspend "by proclamation" entry of "any" or "all" aliens "as immigrants or nonimmigrants" for such time he "deem[s] necessary" or to restrict their entry as he "deem[s] to be appropriate," "[w]henever" he "finds" that their entry would be "detrimental to the interests of the United States." Ibid. The breadth of that authorization reflects that, "[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power," but also "is implementing an inherent executive power." United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950). As courts have long recognized, Section 1182(f) confers a "sweeping proclamation power" to suspend entry

of aliens. Abourezk v. Reagan, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (R.B. Ginsburg, J.), aff'd by an equally divided Court, 484 U.S. 1 (1987); see Allende v. Shultz, 845 F.2d 1111, 1117-1118 (1st Cir. 1988).

The court of appeals read into that provision a requirement that, before suspending entry, the President must articulate a factual finding -- satisfactory to courts -- that "support[s] the conclusion that entry of all nationals" whose entry he suspends "would be harmful to the national interest." Supp. Add. 36. That requirement turns the statute's text on its head. The statute's language authorizing the President to suspend or restrict entry "[w]henever [he] finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States," 8 U.S.C. 1182(f), does not constrain his authority, but confirms its expansive sweep. Congress placed no restrictions on which "interests" count or what "detriment[s]" suffice for the President to invoke his authority, committing all of those matters to the President's judgment and discretion. And the statute expressly contemplates that he may make these determinations on a broad scale, authorizing him to "suspend the entry of all aliens or any class of aliens." Ibid.

The only prerequisite Congress imposed is that the "President find[]" entry of some or all aliens would be detrimental to the Nation's interests, 8 U.S.C. 1182(f), irrespective of whether a court would so find. In Webster v. Doe, 486 U.S. 592 (1987),

confronted with a statute that similarly granted the CIA Director authority to terminate employees if he "deem[ed] such termination necessary or advisable in the interests of the United States," this Court held that judicial review of termination decisions was unavailable under the Administrative Procedure Act (APA) because the Court "s[aw] no basis on which a reviewing court could properly assess an Agency termination decision." Id. at 600 (citation omitted). So too here, Section 1182(f) "fairly exudes deference to the [President]" and "appears to foreclose * * * the application of any meaningful judicial standard of review." Ibid. Indeed, the President's decisions are not "reviewable for abuse of discretion under the APA" at all. Franklin v. Massachusetts, 505 U.S. 788, 800-801 (1992); Dalton v. Specter, 511 U.S. 462, 474-476 (1994) (courts may not second-guess determinations vested in the President's discretion).

The President generally need not "disclose" his "reasons for deeming nationals of a particular country a special threat," Reno v. American-Arab Anti-Discrim. Comm., 525 U.S. 471, 491 (1999), which may rest on classified or sensitive material. And when the President does disclose his reasons for deeming certain nationals to present a risk to national security, courts are "ill equipped to determine their authenticity and utterly unable to assess their adequacy." Ibid. The court of appeals therefore seriously erred in holding that Section 1182(f) subjects the President's assessment of harm to the Nation's interests to judicial review,

under a standard of the court's creation akin to review of agency action under the APA.

b. Historical practice further refutes the court of appeals' misreading of the statute. Presidential orders dating back decades have invoked Section 1182(f) to suspend or restrict entry without any detailed finding that entry of particular aliens would be detrimental to this Nation -- often explaining the President's rationale in one or two sentences that broadly declare the Nation's interests.[3] Indeed, as the court of appeals acknowledged, some orders have suspended or restricted entry "not because of a particular concern that entry of the individuals themselves would be detrimental, but rather, as retaliatory diplomatic measures." Supp. Add. 40 n.13 (emphases added); see, e.g., Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986) (suspending entry of "all Cuban nationals," with certain exceptions, based on Cuban government's decision to suspend execution of an immigration agreement with this Nation). This practice confirms the breadth of the President's authority and the wide latitude the statute accords him to determine, in his discretion, that suspending entry is in the national interest.

[3] See, e.g., Proclamation No. 8693, 76 Fed. Reg. 44,751 (July 27, 2011); Proclamation No. 8342, 74 Fed. Reg. 4093 (Jan. 22, 2009); Proclamation No. 6958, 61 Fed. Reg. 60,007 (Nov. 26, 1996); Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (June 1, 1992); Proclamation No. 5887, 53 Fed. Reg. 43,185 (Oct. 26, 1988); Proclamation No. 5829, 53 Fed. Reg. 22,289 (June 14, 1988).

c. The Order amply satisfies any requirement Section 1182(f) imposes. Section 2(c)'s entry suspension -- the provision respondents principally challenged below -- is supported by extensive findings set forth in the Order concerning the national-security risks the six countries present. The fact that each country "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," both (1) creates a heightened risk that "conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States" and thereafter may be difficult to "remove," and (2) "diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States." Order § 1(d).

After detailing the deteriorating conditions in each country, Order § 1(e), the Order concludes that, "until the assessment of current screening and vetting procedures required by [S]ection 2" is completed, "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high," id. § 1(f). On that basis -- and to reduce investigative burdens while the review of existing procedures is ongoing -- the Order determines that entry from the six countries (absent an individual waiver) "would be detrimental to the interests of the United States." Id. § 2(c). Simply put, in the

face of uncertainty over whether these foreign governments that sponsor or shelter terrorism are able and willing to provide needed information, the President placed a 90-day pause on entry of their nationals (subject to case-by-case waivers) while the Departments of State and Homeland Security review existing procedures. Under any standard of review, that action -- and the findings on which it is based -- readily pass muster.

The Refugee Program suspension and refugee cap similarly rest on the President's determination that those measures are justified by the national interest. As the Order explains, the prior Executive Order it replaced "temporarily suspended the [Refugee Program] pending a review of our procedures for screening and vetting refugees" in light of the fact that "[t]errorist groups have sought to infiltrate several nations through refugee programs." Order § 1(b)(iii). The Order notes that "more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation" and some have been "convicted of terrorism-related crimes." Id. § 1(h). And it reduces the maximum number of refugees who may be admitted in Fiscal Year 2017 based on an express finding that entry of more than 50,000 "would be detrimental to the interests of the United States." Id. § 6(b).

d. The court of appeals dismissed all of these determinations as insufficient, and in doing so substituted its

own assessment of national-security risks for the Executive's. Supp. Add. 37-48.

i. The court deemed the national-security justification for Section 2(c)'s entry suspension inadequate because the Order does not find "that nationality alone renders entry of" the covered individuals "a heightened security risk" -- for example, by "t[ying] these nationals" to "terrorist organizations," "identify[ing] these nationals as contributors to active conflict," or showing a "link between an individual's nationality and their propensity to commit terrorism." Supp. Add. 38-39. The court's reasoning fundamentally misunderstands the basis for the Order. The President is uncertain whether certain foreign governments -- especially those that sponsor or shelter terrorism -- are able and willing to provide sufficiently complete and reliable information to "tie" particular foreign nationals to "terrorist organizations," "identify" them "as contributors to active conflict," or establish a "link" between them and "their propensity to commit terrorism." In light of that uncertainty, and the accompanying risk that our government might fail to detect a terrorist threat, the President determined that placing a 90-day pause on entry of nationals from these countries (subject to individualized waivers) is appropriate to avoid detriments to the national interest. Order § 1(d).

One purpose of that temporary pause -- and the accompanying review and report that the President instructed the Secretaries of

Homeland Security and State and the Director of National Intelligence to undertake, Order § 2(a) and (b) -- is to gather the information that the court of appeals faulted the President for not already possessing. The court's decision limits the authority of a newly elected Executive to adjudge for itself whether the information provided by certain foreign governments is adequate to permit the detection of threats to the Nation. It is no answer to say that the Order is overinclusive and underinclusive, because it encompasses nationals who currently lack significant ties to their home countries, while omitting aliens who are not nationals of but have close ties to the listed countries. Supp. Add. 41-42. The President's concern was the willingness and ability of certain foreign governments to provide information about their own nationals.

The court of appeals deemed that concern insufficient to justify Section 2(c) because the Order did not affirmatively find that existing information-sharing procedures are in fact inadequate. Supp. Add. 41-42. In the court's view, the government currently has sufficient tools at its disposal to ensure the reliability of such information. Ibid. But Section 1182(f) plainly permits the President to suspend or restrict entry based on risks he perceives, without waiting for them to become reality. The President's "[p]redictive judgment[s]" warrant the utmost deference. Department of the Navy v. Egan, 484 U.S. 518, 527-529 (1988). Especially "when it comes to collecting evidence and

drawing factual inferences" in the national-security context, "the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate." Holder v. Humanitarian Law Project, 561 U.S. 1, 34 (2010) (HLP) (citation omitted).

ii. The court of appeals gave equally short shrift to the Order's assessment of risks related to Section 6's refugee provisions, which respondents barely mentioned in the district court. It stated that the Order "does not reveal any threat or harm to warrant suspension of" the Refugee Program or find that "present vetting and screening procedures are inadequate," and the Order's stated goal of facilitating a review "do[es] not support a finding that the travel and admission of refugees would be detrimental to the interests of the United States." Supp. Add. 45-46. But again, one purpose of the Order is to allow review to ensure adequate screening is in place, and it expressly notes that "[t]errorist groups have sought to infiltrate several nations through refugee programs" and that "more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation," some of whom have been "convicted of terrorism-related crimes." Order § 1(b)(iii) and (h).

In addition, the court of appeals believed that the Order fails to give any reason for limiting the number of refugees to 50,000. Supp. Add. 47. But after reciting the number of refugee-

related counterterrorism investigations, the Order expressly states "that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States." Order § 6(b). Nothing more is required. The court apparently believed that Section 6(b) is invalid because, having already recited refugee-related risks, it does not provide sufficient detail why those refugee-related risks justify a cap of 50,000 refugees. That is not the proper judicial role in reviewing such Executive action. When the Executive adopts "a preventive measure * * * in the context of international affairs and national security," it "is not required to conclusively link all the pieces in the puzzle before [courts] grant weight to its empirical conclusions." HLP, 561 U.S. at 35. All Section 1182(f) required is that the President find that entry of more than 50,000 refugees would be "detrimental" to the Nation's interests. That is precisely what he did.

2. Section 2(c) is consistent with 8 U.S.C. 1152

The court of appeals also held that Section 2(c)'s entry suspension of nationals from six countries violates 8 U.S.C. 1152(a)(1)(A), which prohibits "discriminat[ing]" or granting a "preference or priority" in the "issuance of an immigrant visa because of," inter alia, an alien's "nationality." Ibid. As the government explained in its briefing below, that is incorrect, and even on the court of appeals' reading, Section 1152(a)(1)(A) could not support the injunction. Gov't C.A. Reply Br. 21-24.

Section 1182(f) expressly authorizes the President to suspend or restrict entry of "any class of aliens," and the Executive historically has exercised that power to exclude entry based on nationality. Gov't C.A. Reply Br. 22. This Court has deemed it "perfectly clear that [Section] 1182(f) * * * grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 187 (1993). That Section 2(c)'s entry suspension is implemented by withholding visas from aliens who do not qualify for a waiver does not violate Section 1152(a)(1)(A). Given that the President can suspend entry of aliens "as immigrants or nonimmigrants," 8 U.S.C. 1182(f), including based on nationality, Section 1152(a)(1)(A) cannot be construed to require that aliens validly barred from entry be issued a visa permitting them to travel to the United States -- only to be denied entry upon arrival.

The court of appeals, however, held that Section 1152(a)(1)(A) "cabins the President's authority under [Section] 1182(f)" to suspend entry. Supp. Add. 51-52. The statutes do not conflict, but even if they did, Section 1182(f) would govern. The court's contrary approach requires reading Section 1152(a)(1)(A) as partially "repeal[ing]" Section 1182(f) by "implication," which courts will not do unless Congress's "intention" is "clear" and "manifest." National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662, 664 n.8 (2007) (citation omitted).

And it raises serious constitutional questions the Court must avoid if possible. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). The court of appeals' holding means that, as a statutory matter, the President cannot suspend the entry of aliens from any country, even if he is aware of a particular threat from an unidentified national of that country or the United States is on the brink of war with that country.

Even if the court of appeals' approach were correct, it still would not justify the existing injunction against Section 2(c). Section 1152(a)(1)(A) by its terms concerns only the "issuance of * * * immigrant visa[s]." It does not purport to compel the President to permit entry of an alien whom he has determined should be excluded in the national interest under Section 1182(f). Moreover, as the district court in IRAP v. Trump recognized, Section 1152(a)(1)(A) is further limited to immigrant visas. No. 17-361, 2017 WL 1018235, at *10 (D. Md. Mar. 16, 2017). It has no bearing on the large number of aliens from the six countries who seek nonimmigrant visas, and it thus cannot support the injunction the court of appeals upheld against every application of Section 2(c).

3. Section 6(b) is consistent with 8 U.S.C. 1157

The court of appeals also incorrectly held that Section 6(b)'s reduction of the refugee cap for Fiscal Year 2017, which respondents barely addressed below, violates 8 U.S.C. 1157. Supp.

Add. 56-60. Section 1157 establishes a procedure for setting the maximum number of refugees who may be admitted each fiscal year. 8 U.S.C. 1157(a)(2). It provides that "the number of refugees who may be admitted" in any fiscal year "shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation." Ibid. (emphasis added). The statute prescribes a process for "appropriate consultation" involving in-person meetings among Cabinet-level officials and congressional leaders. 8 U.S.C. 1157(e). If an "unforeseen emergency refugee situation" arises mid-year, the President may (after "appropriate consultation") set a higher maximum. 8 U.S.C. 1157(b).

The court of appeals held that Section 6(b) violates Section 1157 because the maximum number of refugees for Fiscal Year was previously set at 110,000, and Section 6(b) reduced that number without "appropriate consultation." Supp. Add. 56-60. But Section 1157(a)(2) sets only the number who "may be admitted," not the number who must be admitted. Although the President cannot increase mid-year the number of refugees who may be admitted without "appropriate consultation," nothing in the statute requires that the maximum number of refugees set at the beginning of the fiscal year actually be admitted or prohibits the President from allowing only a smaller number. That makes perfect sense: Congress wanted refugee admissions to be limited, with its leadership involved in setting an annual ceiling on refugee

admissions and deciding whether to exceed that limit mid-year due to unanticipated events.[4] But a smaller number may be admitted for many reasons, such as budgetary constraints, logistical concerns, or foreign-relations issues. The number of refugees actually admitted frequently falls well below the predetermined cap.[5] And it would make no sense for Congress to mandate that a fixed number of refugees be admitted if the President determines, under Section 1182(f) or otherwise, that the national interest requires reducing that figure.

The court of appeals misconstrued Section 1157(a) to set not only a ceiling on refugee admissions, but also a "floor." Supp. Add. 57. The court stated that "the number of refugees who may be admitted shall be the number determined by the President" after appropriate consultation, ibid., but it glossed over the critical discretionary language: "may be admitted." The court also asserted that a contrary view would render Section 1157's

[4] See H.R. Rep. No. 608, 96th Cong., 1st Sess. 10 (1979) ("[C]onsultation with Congress with respect to numbers of refugees admitted is only required when the [statutory] limit is exceeded.").

[5] From 2001 to 2012, the number of refugees admitted fell short of the annual cap by an average of nearly 21,000, and in 2002 and 2003 fewer than half of the then-authorized 70,000 refugees were admitted. See Refugee Processing Ctr., Bureau of Population, Refugee & Migration, U.S. Dep't of State, Refugee Admissions Report (May 31, 2017), https://goo.gl/LyoOl1; see also Migration Policy Institute, U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present, https://goo.gl/0XI98I (last visited June 15, 2017).

procedures superfluous, ibid., but that is untrue: if the President wants to increase the ceiling mid-year, he must utilize Section 1157's protocol.

The court of appeals finally asserted that Section 1157 supersedes Section 1182(f) because it is later in time and more specific. Supp. Add. 58-59. Those attributes are immaterial because the provisions do not conflict. Section 1182(f) authorizes the President to suspend or restrict entry. That is entirely consistent with Section 1157, which merely sets a cap on refugee admissions.[6]

C. Respondents' Establishment Clause Claim Is Meritless

In the courts below and in their stay opposition, respondents urged upholding the injunction on Establishment Clause grounds. Opp. 19-27. As the government has shown, that constitutional challenge is not justiciable and lacks merit. Stay Appl. 20-33. Respondents' opposition casts no doubt on those conclusions.

1. Respondents assert that their Establishment Clause claim is justiciable, Opp. 19, but they never explain how the Order's application to aliens abroad violates respondents' own rights under that Clause. The Order does not apply to Dr. Elshikh at all. Stay Appl. 21-22. And Hawaii has no Establishment Clause rights to assert here. Id. at 21; see Gov't C.A. Reply Br. 5.

[6] The court of appeals noted but did not rule on respondents' argument that Section 2(c)'s entry suspension violates 8 U.S.C. 1182(a)(3)(B), which addresses admissibility of aliens with certain ties to terrorism. Supp. Add. 60-61. That argument likewise lacks merit. See Gov't C.A. Reply Br. 24-25.

2. Respondents contend that Kleindienst v. Mandel, 408 U.S. 753 (1972), is inapplicable to broad policy decisions, and applies only to a "decision to exclude an individual alien." Opp. 20. This Court has held otherwise. See, e.g., Fiallo, 430 U.S. at 792-794; Stay Appl. 26. And the notion that a court "cannot look behind the decision of a consular officer" in an individual case, "but can examine the decision of the President[,] stands the separation of powers on its head." Amended Order, Washington v. Trump, No. 17-35105 (9th Cir. Mar. 17, 2017), slip op. 13 (Bybee, J., dissenting from denial of reconsideration en banc).

Respondents do not deny that Mandel's "facially legitimate and bona fide" standard entails only "minimal scrutiny (rational-basis review)." Sessions v. Morales-Santana, No. 15-1191 (June 12, 2017), slip op. 15. They reprise their argument that Mandel's "bona fide" language means courts "must be permitted to look behind a national security rationale" in search of pretext. Opp. 23. But that is precisely what Mandel rejected. 408 U.S. at 770; Stay Appl. 27. Such an inquiry into subjective motivations is also inconsistent with Kerry v. Din, 135 S. Ct. 2128 (2015). For the reasons set forth in the government's briefs in IRAP, neither Mandel nor Din provides any basis for respondents' Establishment Clause claim. IRAP Cert. Pet. 20-26; IRAP Cert. Reply 6-8. Respondents' assertion (Opp. 24-27) that their Establishment Clause claim would succeed under domestic case law is similarly meritless. Stay Appl. 28-33; IRAP Cert. Reply 8-10.

III. THE BALANCE OF EQUITIES DECISIVELY FAVORS A STAY

As the government has demonstrated, the balance of equities weighs in favor of a stay. Stay Appl. 33-36. Even as narrowed by the Ninth Circuit, the injunction in this case still sweeps beyond the injunction at issue in IRAP and interferes with the President's judgments regarding how to discharge his constitutional and statutory duty to protect the Nation.

A. Respondents assert (Opp. 33) that the government's purported delay in litigating shows it suffers no irreparable harm. But the government has moved with dispatch at every step. The President issued the revised Order less than three weeks after the government informed the Ninth Circuit that he intended to do so -- hardly an unreasonable length of time for an interagency process that culminated in a revised Order reflecting material substantive changes and detailed factual findings. When the district court entered the TRO, the government did not immediately appeal because proceedings regarding whether and on what terms to convert the TRO to an appealable preliminary injunction were still ongoing. It cannot be faulted for asking the court to clarify and narrow the scope of relief before converting the TRO to an appealable injunction -- especially because the court itself requested briefing on the conversion, and the Ninth Circuit ultimately held that the injunction was overbroad. Supp. Add. 69-72, 76.

Once the injunction was issued, the government promptly appealed and sought a stay and expedited briefing. Gov't C.A. Stay Reply Br. 3-4. It sought to brief the merits and its stay request simultaneously because of the complexity of the issues and the need for definitive resolution. Ibid. Respondents cite no case in which this Court (or one of its Members) has deemed such expedited litigation to be dilatory.[7]

B. Respondents also assert (Opp. 37) that the injunction leaves the government free to take other action to improve screening and vetting. But the President is entitled to take more than one measure to protect the Nation. And the other steps that respondents identify do not address the same concerns as Section 2(c). For example, respondents note (ibid.) that the Department of State is implementing new screening procedures requiring certain visa applicants to provide additional information to consular officers. See 82 Fed. Reg. 20,956 (May 4, 2017). Seeking additional information from visa applicants themselves addresses a concern different from, and is not an adequate substitute for, ensuring that foreign governments are willing and able to "share or validate important information about individuals seeking to travel to the United States." Order § 1(d).

[7] See Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (granting stay despite applicant's "eight-week delay"); cf. Ruckelshaus v. Monsanto Co., 463 U.S. 1315, 1317-1318 (1983) (Blackmun, J., in chambers) (government waited "more than seven weeks" after district court's decision before seeking stay and "requested and received a 30-day extension" in this Court, and even then delay was "certainly not dispositive").

C. At a minimum, the Court should stay the injunction because even as narrowed it goes far beyond redressing violations of respondents' own rights. Stay Appl. 37-40. Respondents identify no cognizable, irreparable harm caused by application of the enjoined provisions to persons other than Dr. Elshikh's mother-in-law, even assuming, arguendo, that Dr. Elshikh has a cognizable and ripe claim to that extent.

CONCLUSION

The Court should construe the government's stay application as a petition for a writ of certiorari and grant the petition along with the petition for a writ of certiorari in IRAP. In addition, the Court should stay the injunction in its entirety pending disposition of the petition and any further proceedings in this Court. At a minimum, it should stay the injunction as to all persons other than Dr. Elshikh's mother-in-law.

Respectfully submitted.

Jeffrey B. Wall /cwh

JEFFREY B. WALL
Acting Solicitor General

JUNE 2017

SUPPLEMENTAL ADDENDUM

Court of Appeals Opinion (9th Cir. June 12, 2017).....1

FILED

JUN 12 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF HAWAII; ISMAIL ELSHIKH, Plaintiffs-Appellees, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, in his official capacity as Secretary of State; UNITED STATES OF AMERICA, Defendants-Appellants.	No. 17-15589 D.C. No. 1:17-cv-00050-DKW-KSC OPINION

Appeal from the United States District Court
for the District of Hawai'i
Derrick Kahala Watson, District Judge, Presiding

Argued and Submitted May 15, 2017
Seattle, Washington

Before: Michael Daly Hawkins, Ronald M. Gould, and Richard A. Paez, Circuit Judges.

Per Curiam Opinion

OPINION[1]

PER CURIAM:

We are asked to delineate the statutory and constitutional limits to the President's power to control immigration in this appeal of the district court's order preliminarily enjoining two sections of Executive Order 13780 ("EO2" or "the Order"), "Protecting the Nation From Foreign Terrorist Entry Into the United States." The Immigration and Nationality Act ("INA") gives the President broad powers to control the entry of aliens, and to take actions to protect the American public. But immigration, even for the President, is not a one-person show. The President's authority is subject to certain statutory and constitutional restraints. We conclude that the President, in issuing the Executive Order, exceeded the scope of the authority delegated to him by Congress. In suspending the entry of more than 180 million nationals from six countries, suspending the entry of all refugees, and reducing the cap on the admission of refugees from 110,000 to 50,000 for the 2017 fiscal year, the President did not meet the essential precondition to exercising his delegated authority: The President must make a sufficient finding that the entry of these classes of people would be "detrimental to the interest of the United States." Further, the Order runs afoul of other provisions of the INA that prohibit

[1] We thank the parties and their counsel, as well as the amici, for their excellent briefs and arguments in this case.

nationality-based discrimination and require the President to follow a specific process when setting the annual cap on the admission of refugees. On these statutory bases, we affirm in large part the district court's order preliminarily enjoining Sections 2 and 6 of the Executive Order.

I

A

One week after inauguration and without interagency review, President Donald J. Trump issued Executive Order 13769 ("EO1"). Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).[2] Entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States," EO1's stated purpose was to "protect the American people from terrorist attacks by foreign nationals admitted to the United States." *Id.* EO1 recited that "[n]umerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program." *Id.*

EO1 mandated two main courses of action to assure that the United States remain "vigilant during the visa-issuance process to ensure that those approved for

[2] EO1 was a predecessor to Executive Order 13780, which is the subject of the current appeal.

admission do not intend to harm Americans and that they have no ties to terrorism." *Id.* In Section 3, the President invoked his authority under 8 U.S.C. § 1182(f) to suspend for 90 days immigrant and nonimmigrant entry into the United States of nationals from seven majority-Muslim countries: Iraq, Iran, Libya, Sudan, Somalia, Syria, and Yemen. *See id.* at 8978. In Section 5, the President immediately suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days, imposed a ban of indefinite duration on the entry of refugees from Syria, and limited the entry of refugees to 50,000 in fiscal year 2017. *Id.* at 8979. EO1 also ordered that changes be made to the refugee screening process "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." *Id.* EO1 permitted the Secretaries of State and Homeland Security to make case-by-case exceptions to these restrictions "when in the national interest," and explained that it would be in the national interest "when the person is a religious minority in his country of nationality facing religious persecution." *Id.*

EO1 took immediate effect, causing great uncertainty as to the scope of the order, particularly in its application to lawful permanent residents. Notably, federal officials themselves were unsure as to the scope of EO1, which caused mass confusion at airports and other ports of entry. *See* Brief of the Foundation of

Children of Iran and Iranian Alliance Across Borders as Amici Curiae, Dkt. No. 77 at 11–12 (describing how an Iranian visa holder was turned away while en route to the United States because of the confusion regarding the contours of EO1's scope); Brief of Former National Security Officials as Amici Curiae, Dkt. No. 108 at 25 n.53 & 54 (noting confusion at airports because officials were neither consulted nor informed of EO1 in advance).

Shortly after EO1 issued, the States of Washington and Minnesota filed suit in the Western District of Washington to enjoin EO1. On February 3, 2017, the district court granted a temporary restraining order ("TRO"). *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). On February 4, 2017, the Government filed an emergency motion in our court, seeking a stay of the TRO pending appeal.

On February 9, 2017, this court denied the Government's emergency motion for a stay of the injunction. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017). In so doing, the panel rejected the Government's arguments that EO1 was wholly unreviewable. *See id.* at 1161–64. After determining that the states had standing based on the alleged harms to their proprietary interests, *id.* at 1159–61, this court concluded that the states demonstrated a likelihood of success on their procedural due process claim, at least as to lawful permanent residents and nonimmigrant visa

holders, *id.* at 1164–66. The panel did not review the states' other claims, including the statutory-based claims. *Id.* at 1164.

Rather than continue with the litigation, the Government filed an unopposed motion to voluntarily dismiss the underlying appeal after the President signed EO2. On March 8, 2017, this court granted that motion, which substantially ended the story of EO1. The curtain opens next to the present controversy regarding EO2.

B

On March 6, 2017, the President issued EO2, also entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017). The revised Order was to take effect on March 16, 2017, at which point EO1 would be revoked. *Id.* at 13218. The Order expressly stated that EO1 "did not provide a basis for discriminating for or against members of any particular religion" and was "not motivated by animus toward any religion." *Id.* at 13210.

Section 2—"Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period"—reinstates the 90-day ban on travel for nationals of six of the seven majority-Muslim countries identified in EO1: Iran, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* at 13213. Section 2 also directs the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence to "conduct a worldwide review to identify whether, and if so

what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat." *Id.* at 13212. Section 2(c) states in full:

> To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. [§§] 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

Id. at 13213.

Regarding the six identified countries, EO2 explains:

> Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of

> these countries typically delay issuing, or refuse to issue, travel documents.

Id. at 13210. Based on the conditions of these six countries, "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." *Id.* at 13211.

The Order states that it no longer includes Iraq on the list of designated countries because of Iraq's "close cooperative relationship" with the United States and its recent efforts to enhance its travel documentation procedures. *Id.* at 13212. The Order also states that its scope has been narrowed from EO1 in response to "judicial concerns" about the suspension of entry with respect to certain categories of aliens. *Id.* EO2 applies only to individuals outside of the United States who do not have a valid visa as of the issuance of EO1 or EO2. EO2, unlike EO1, expressly exempts lawful permanent residents, dual citizens traveling under a passport issued by a country not on the banned list, asylees, and refugees already admitted to the United States. *See id.* at 13213–14. The Order also provides that consular officers or Customs and Border Protection officials can exercise discretion in authorizing case-by-case waivers to issue visas and grant entry during the suspension period, and offers examples of when waivers "could be appropriate." *See id.* at 13214–15.

Section 6—"Realignment of the U.S. Refugee Admissions Program for

Fiscal Year 2017"—suspends USRAP for 120 days. *Id.* at 13215. During this period, the heads of certain executive agencies are directed to review the current USRAP application and adjudication processes, and to determine the additional procedures that "should" be required for individuals seeking admission as refugees. *See id.* at 13215–16. Invoking 8 U.S.C. § 1182(f), Section 6(b) reduces the number of refugees to be admitted from 110,000 to 50,000 in fiscal year 2017. *Id.* at 13216. The Order also removes EO1's preference for refugees facing persecution as a member of a minority religion, and no longer imposes a complete ban on Syrian refugees. Section 6 further provides for discretionary case-by-case waivers. *Id.*

EO2 supplies additional information relevant to national security concerns. The Order includes excerpts from the State Department's 2015 Country Reports on Terrorism, that it asserts demonstrate "why . . . nationals [from the designated countries] continue to present heightened risk to the security of the United States." *Id.* at 13210; *see id.* at 13210–11 (providing a brief description of country conditions for each of the designated countries). The Order states that foreign nationals and refugees have committed acts of terrorism:

> Recent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security. Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States. They have included not just persons who came here legally on visas but also individuals who first entered the country as refugees. For example, in

> January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon. The Attorney General has reported to me that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation.

Id. at 13212. EO2 does not discuss any instances of domestic terrorism involving nationals from Iran, Libya, Sudan, Syria, or Yemen.

C

Two versions of a report from the Department of Homeland Security ("DHS") surfaced after EO1 issued. First, a draft report from DHS, prepared about one month after EO1 issued and two weeks prior to EO2's issuance, concluded that citizenship "is unlikely to be a reliable indicator of potential terrorist activity" and that citizens of countries affected by EO1 are "[r]arely [i]mplicated in U.S.-[b]ased [t]errorism." Specifically, the DHS report determined that since the spring of 2011, at least eighty-two individuals were inspired by a foreign terrorist group to carry out or attempt to carry out an attack in the United States. Slightly more than half were U.S. citizens born in the United States, and the remaining persons were from twenty-six different countries—with the most individuals originating from Pakistan, followed by Somalia, Bangladesh, Cuba, Ethiopia, Iraq, and Uzbekistan.

Id. Of the six countries included in EO2, only Somalia was identified as being among the "top" countries-of-origin for the terrorists analyzed in the report. During the time period covered in the report, three offenders were from Somalia; one was from Iran, Sudan, and Yemen each; and none was from Syria or Libya. The final version of the report, issued five days prior to EO2, concluded "that most foreign-born, [U.S.]-based violent extremists likely radicalized several years *after* their entry to the United States, [thus] limiting the ability of screening and vetting officials to prevent their entry because of national security concerns" (emphasis added).

The same day EO2 issued, Attorney General Jefferson B. Sessions III and Secretary of Homeland Security John F. Kelly submitted a letter to the President recommending that he "direct[] a temporary pause in entry" from countries that are "unable or unwilling to provide the United States with adequate information about their nationals" or are designated as "state sponsors of terrorism."

D

The State of Hawai'i ("the State") filed a motion for a TRO seeking to enjoin EO1, which the District of Hawai'i did not rule on because of the nationwide TRO entered in the Western District of Washington. After EO2 issued, the State filed an amended complaint challenging EO2 in order "to protect its residents, its employers, its educational institutions, and its sovereignty." Dr.

Elshikh, the Imam of the Muslim Association of Hawai'i, joined the State's challenge because the Order "inflicts a grave injury on Muslims in Hawai'i, including Dr. Elshikh, his family, and members of his Mosque." In 2015, Dr. Elshikh's wife filed an I-130 Petition for Alien Relative on behalf of her mother—Dr. Elshikh's mother-in-law—a Syrian national living in Syria. Dr. Elshikh fears that his mother-in-law will not be able to enter the United States if EO2 is implemented. Plaintiffs named as Defendants Donald J. Trump, in his official capacity as President of the United States; the U.S. Department of Homeland Security; John F. Kelly, in his official capacity as Secretary of Homeland Security; the U.S. Department of State; Rex W. Tillerson, in his official capacity as Secretary of State; and the United States of America (collectively referred to as "the Government").

Plaintiffs allege that EO2 suffers similar constitutional and statutory defects as EO1 and claim that the Order violates: the Establishment Clause of the First Amendment; the equal protection guarantees of the Fifth Amendment's Due Process Clause on the basis of religion and/or national origin, nationality, or alienage; the Due Process Clause of the Fifth Amendment based on substantive due process rights; the Due Process Clause of the Fifth Amendment based on procedural due process rights; the Immigration and Nationality Act; the Religious Freedom Restoration Act; and the Administrative Procedure Act. For their INA

claim, Plaintiffs specifically contend that EO2 violates the INA by discriminating on the basis of nationality, ignoring and modifying the statutory criteria for determining terrorism-related inadmissibility, and exceeding the President's delegated authority under the INA.[3] Plaintiffs also filed a motion for a TRO along with their amended complaint.

On March 15, 2017, the district court granted the TRO, holding that Plaintiffs had shown a likelihood of success on the merits of their Establishment Clause claim, and entered a nationwide injunction prohibiting enforcement of Sections 2 and 6 of EO2. *See Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 1011673 (D. Haw. Mar. 15, 2017) ("*Hawai'i TRO*"). On March 29, 2017, the district court granted Plaintiffs' motion to convert the TRO to a preliminary injunction. *See Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 1167383 (D. Haw. Mar. 29, 2017) ("*Hawai'i PI*"). The district court declined to narrow the scope of the injunction, concluding that the entirety of Sections 2 and 6 of the Order ran afoul of the Establishment Clause and that the Government did not provide a workable framework for narrowing the scope of the enjoined conduct. *See id.* at *8. The court entered the following injunction:

> Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation

[3] On appeal, Plaintiffs also contend that EO2 violates the INA because it ignores the codified procedures for setting annual refugee admissions provided in 8 U.S.C. § 1157.

> with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

Id. at *9.

On March 30, 2017, the Government filed a notice of appeal. This court granted the Government's unopposed motion to expedite the case. The Government requests that this court vacate the preliminary injunction, or at least narrow the injunction, and also stay the injunction pending appeal.

II

The district court held that Plaintiffs were entitled to preliminary relief because they had made a strong showing of success on the merits of their Establishment Clause claim. Applying the secular purpose test from *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), and relying on the historical record that contained "significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order," the district court concluded that EO2 was issued with an intent to disfavor people of Islamic faith. *See Hawai'i TRO*, 2017 WL 1011673, at *12–16. In so doing, the district court decided an important and controversial constitutional claim without first expressing its views on Plaintiffs' statutory claims, including their INA-based claim. *See id.* at *11 n.11.

The INA claim was squarely before the district court and briefed and argued

before this court. Mindful of the Supreme Court's admonition that "courts should be extremely careful not to issue unnecessary constitutional rulings," "[p]articularly where, as here, a case implicates the fundamental relationship between the Branches," we think it appropriate to turn first to the INA claim. *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam); *accord Lying v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

After first determining that Plaintiffs have standing to assert their INA-based statutory claim, we conclude that Plaintiffs have shown a likelihood of success on the merits of that claim and that the district court's preliminary injunction order can be affirmed in large part based on statutory grounds. For reasons further explained below, we need not, and do not, reach the Establishment Clause claim to resolve this appeal. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

III

Before turning to our review of Plaintiffs' statutory claim, we first address

the Government's challenge to the preliminary injunction order on justiciability grounds. The Government contends both that Plaintiffs lack standing to pursue this case and that the case is not yet ripe. The Government further contends that the consular nonreviewability doctrine bars this court from reviewing EO2. We address each contention in turn.

A

"Article III of the Constitution limits federal-court jurisdiction to 'Cases' and 'Controversies.'" *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy" and limits who may "maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). "At this very preliminary stage of the litigation, [Plaintiffs] may rely on the allegations in their [amended complaint] and whatever other evidence they submitted in support of their [preliminary

injunction] motion to meet their burden." *Washington*, 847 F.3d at 1159; *see Lujan*, 504 U.S. at 561.

The district court determined that both the State of Hawai'i and Dr. Elshikh have standing to pursue their Establishment Clause claim. *See Hawai'i TRO*, 2017 WL 1011673, at *7–10. The Government argues that Plaintiffs fail to satisfy the requirements of Article III standing to bring their Establishment Clause claim. Plaintiffs must establish standing for each of their claims. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). As we do not reach Plaintiffs' Establishment Clause claim, we address only whether Plaintiffs have standing to challenge EO2 based on their INA-based statutory claim and conclude that they do.

1

Dr. Elshikh is an American citizen of Egyptian descent. He alleges that EO2 will prevent his mother-in-law from obtaining a visa to reunite with her family. His mother-in-law is a Syrian national currently living in Syria; she last visited her family in Hawai'i in 2005 and has not yet met two of her five grandchildren. Dr. Elshikh's wife filed an I-130 Petition for Alien Relative on behalf of her mother in September 2015, and the petition was approved in February 2016. After EO1 issued, Dr. Elshikh was told that his mother-in-law's visa application for an immigrant visa had been put on hold. After EO1 was enjoined, he was notified that the application had progressed to the next stage of the process, and that her

interview would be scheduled at an embassy overseas. Dr. Elshikh understandably and reasonably fears that EO2 will prevent his mother-in-law from entering the country.[4] Dr. Elshikh asserts that he has standing based on the barriers EO2 imposes in preventing him from reuniting his mother-in-law with his family.

This court and the Supreme Court have reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner. *See, e.g.*, *Kerry v. Din*, 135 S. Ct. 2128, 2131 (2015) (involving a challenge by a U.S. citizen to the denial of her husband's visa); *Kleindienst v. Mandel*, 408 U.S. 753, 756–60 (1972) (addressing a challenge by American professors to the denial of a visa to a journalist they had invited to speak at several academic events); *Cardenas v. United States*, 826 F.3d 1164, 1167 (9th Cir. 2016) (determining that a U.S. citizen could challenge the denial of her husband's visa). Most similar to this case, in *Legal Assistance for Vietnamese Asylum Seekers v. Department of State, Bureau of Consular Affairs*, the D.C. Circuit determined that visa sponsors had standing to assert that the State Department's refusal to process visa applications of

[4] Dr. Elshikh also alleges that EO2 results in a disfavored religion in Hawai'i and the United States; that the Order communicates to his five children that their own country discriminates against individuals who share their ethnicity and religious beliefs; and that the Order has caused members of the Islamic community in Hawai'i, including members of his mosque, to feel that Muslim citizens are targeted because of their religion and national origin. For purposes of determining standing to pursue the INA-based statutory claim, we need not address these aspects of Dr. Elshikh's injury.

Vietnamese citizens living in Hong Kong violated 8 U.S.C. § 1152. 45 F.3d 469, 471–73 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). The court explained that the State Department's actions prolonged the separation of immediate family members, which resulted in injury to the sponsors. *Id.*

Dr. Elshikh seeks to reunite his mother-in-law with his family and similarly experiences prolonged separation from her. By suspending the entry of nationals from the six designated countries, including Syria, EO2 operates to delay or prevent the issuance of visas to nationals from those countries, including Dr. Elshikh's mother-in-law. Dr. Elshikh has alleged a concrete harm because EO2, specifically the operation of Section 2, is a barrier to reunification with his mother-in-law in light of her stalled visa process. *See id.* (holding that U.S. resident sponsors had standing to challenge the State Department's refusal to process visa applications); *Int'l Refugee Assistance Project v. Trump*, — F.3d —, No. 17-1351, 2017 WL 2273306, at *10 (4th Cir. May 25, 2017) (en banc), *as amended* (May 31, 2017) (identifying prolonged separation between plaintiff and his wife as a concrete harm). That his mother-in-law's visa application process was placed on hold when EO1 took effect, but moved forward when EO1 was enjoined, further shows that Dr. Elshikh's injury is concrete, real, and immediate if EO2 takes effect. Dr. Elshikh has thus alleged a sufficient injury-in-fact. While not challenged by the Government, it is also clear that Dr. Elshikh has established

causation and redressability. His injuries are fairly traceable to the Order, satisfying causation, and enjoining EO2 will remove a barrier to reunification and redress that injury, satisfying redressability.

Dr. Elshikh has met the requirements for constitutional standing with respect to the INA-based statutory claim.

2

The State of Hawai'i alleges two primary theories of harm in asserting its standing: harm to its proprietary interests and impairment of its sovereign interests.

"[L]ike other associations and private parties, a State is bound to have a variety of proprietary interests. A State may, for example, own land or participate in a business venture." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). "And like other such proprietors [the State] may at times need to pursue those interests in court." *Id.* at 601–02.

The State asserts that it has standing because of the injuries inflicted on its university. The University of Hawai'i ("the University"), which the State operates, has twenty-three graduate students, at least twenty-nine visiting faculty members, and other permanent faculty members from the six countries designated in EO2. The State asserts that EO2 constrains the University's ability to recruit and enroll undergraduate and graduate students, and recruit and hire visiting faculty from the affected countries. The State also contends that EO2 threatens the University's

ability to fulfill its educational mission by hampering recruitment of diverse students, preventing scholars from considering employment at the University, dissuading current professors and scholars from continuing their scholarship at the University, hindering the free flow of ideas, and harming its values of inclusiveness and tolerance.

Given the timing of the admissions cycle and this litigation, the State concedes that it is too soon to determine the full impact on recruitment, but asserts that individuals who are not current visa holders or lawful permanent residents would be precluded from considering the University. In its opposition brief, the State gave updated information, explaining that eleven graduate students from the countries affected by the Order have been admitted, and the University was still considering applications from twenty-one other affected applicants. After the case was submitted, Plaintiffs supplemented the record with further updates on the University's admissions cycle.[5] At least three graduate students, each from one of the six designated countries, have accepted their offers of admission and have committed to attending the University. There are eleven graduate student applicants, each from one of the six designated countries, with pending offers of admission for the 2017–18 school year. University classes begin on August 21,

[5] The Government did not oppose Plaintiffs' motion for leave to supplement the record, and we granted the motion.

2017, but at least two of the students who have accepted their offers of admission must be present on campus by August 1, 2017 and August 10, 2017, respectively, for their graduate programs. The State further explains that if EO2 takes effect now, these students' ability to obtain visas will be impeded.

Before Plaintiffs supplemented the record, the Government argued that the State had not identified any prospective student or faculty member who wished to enter the country *during* Section 2(c)'s 90-day period. However, the State's alleged harm is that EO2 *presently* constrains their recruitment efforts for students and faculty, and that EO2 deters prospective students and faculty members. Given the short admissions cycle—from when the University offers admissions to when international students must decide whether to attend—and the uncertainty of whether EO2 will inhibit their ability to secure a visa before the fall semester begins, EO2's deterrent effect is an injury that is "concrete" and "imminent," as opposed to merely "speculative." *See Lujan*, 504 U.S. at 560–61 (internal quotation marks omitted). Of course, a student who is not permitted to obtain a visa and enter our country would not accept an offer of admission.

The Government next contends that Plaintiffs cannot rely on events that unfolded after the filing of the complaint to establish standing. This argument is not persuasive. The State had previously contended that its recruitment was constrained by EO2 and its supplemental declaration merely provides greater detail

regarding the students who may be unable to join the academic community this fall if EO2 takes effect. We consider the supplemental information as further evidence that EO2 will harm the State because students affected by Section 2(c) may not attend the University, and the University will lose tuition and educational benefits.

The State's standing can thus be grounded in its proprietary interests as an operator of the University. EO2 harms the State's interests because (1) students and faculty suspended from entry are deterred from studying or teaching at the University; and (2) students who are unable to attend the University will not pay tuition or contribute to a diverse student body. *See Washington*, 847 F.3d at 1161 (holding that states, as operators of universities, had Article III standing to challenge EO1 based on harms to their proprietary interests); *Texas v. United States*, 809 F.3d 134, 155–63 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (holding that the state of Texas had standing to challenge the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program based on its alleged injury of subsidizing driver's licenses to DAPA beneficiaries). We further conclude that the State has shown that its injury is fairly traceable to EO2 and that enjoining EO2 would redress its harm.

The State also presents an alternative standing theory: that the Order impairs its sovereign interests in carrying out its refugee policies, among other things. A

state has an interest in its "exercise of sovereign power over individuals and entities within the relevant jurisdiction," which "involves the power to create and enforce a legal code." *Alfred L. Snapp & Son*, 458 U.S. at 601. The State contends that EO2 hinders the exercise of its sovereign power to enforce its laws and policies and this inflicts an injury sufficient to provide the State standing to challenge the Order. The State has laws protecting equal rights, barring discrimination, and fostering diversity. *See, e.g.*, Haw. Const. art. 1, §§ 2, 5; Haw. Rev. Stat. §§ 489-3, 515-3. Specific to refugees, the State created the Office of Community Services ("OCS"), which is directed to "[a]ssist and coordinate the efforts of all public and private agencies providing services which affect the disadvantaged, refugees, and immigrants." Haw. Rev. Stat. § 371K-4. OCS operates multiple programs for refugees.

The State has resettled three refugees this fiscal year, and at least twenty since 2010. EO2 would prevent the State from assisting with refugee resettlement and thus prevent it from effectuating its policies aimed at assisting refugee and immigrant populations. *See id.* The State's requested injunctive relief would permit it to assist in the resettlement of refugees, at least through fiscal year 2017. As the State exercises "sovereign power over individuals and entities within the relevant jurisdiction" in administering OCS, we conclude, at this preliminary stage, that the State has made sufficient allegations to support standing to challenge the

refugee-related provisions of EO2. *See Alfred L. Snapp & Son*, 458 U.S. at 601; *see also Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011) (collecting cases where state was found to possess sovereign standing based on state statutes that regulated behavior or provided for the administration of a state program).

Concluding that Dr. Elshikh and the State have satisfied Article III's standing requirements,[6] we turn to whether Plaintiffs are within the "zone of interests" protected by the INA.

3

Because Plaintiffs allege a statutory claim, we must determine whether they meet the requirement of having interests that "fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (internal quotation marks omitted).

We have little trouble determining that Dr. Elshikh is within the zone of interests of the INA to challenge EO2 based on this statutory claim. He asserts that the travel ban prevents his mother-in-law from reuniting with his family. *See*

[6] The State has asserted other proprietary interests, including the loss of tourism revenue. The State also appears to present a standing theory based on its quasi-sovereign interests, as *parens patriae*, to secure its residents from the harmful effects of discrimination. We do not reach these arguments because we conclude that the State's proprietary interests, as an operator of the University of Hawai'i, and its sovereign interests, in carrying out its refugee programs and policies, are sufficient to confer standing. *See Washington*, 847 F.3d at 1161 n.5.

Legal Assistance for Vietnamese Asylum Seekers, 45 F.3d at 471–72 ("The INA authorizes the immigration of family members of United States citizens and permanent resident aliens. In originally enacting the INA, Congress implemented the underlying intention of our immigration laws regarding the preservation of the family unit. Given the nature and purpose of the statute, the resident appellants fall well within the zone of interest Congress intended to protect." (internal quotation marks, citations, and alterations omitted)).

Likewise, the State's efforts to enroll students and hire faculty members who are nationals from the six designated countries fall within the zone of interests of the INA. The INA makes clear that a nonimmigrant student may be admitted into the United States. *See* 8 U.S.C. § 1101(a)(15)(F) (identifying students qualified to pursue a full course of study); 8 C.F.R. § 214.2(f) (providing the requirements for nonimmigrant students, including those in colleges and universities). The INA also provides that nonimmigrant scholars and teachers may be admitted into the United States. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(J) (identifying students, scholars, trainees, teachers, professors, research assistants, specialists, or leaders in fields of specialized knowledge or skill); *id.* § 1101(a)(15)(H) (identifying aliens coming to perform services in a specialty occupation); *id.* § 1101(a)(15)(O) (identifying aliens with extraordinary abilities in the sciences, arts, education, business, or athletics). International students and visiting faculty may qualify for F-1 visas, J-1

visas, H-1B visas, or O-1 visas. *See* Directory of Visa Categories, U.S. Dep't of State, https://travel.state.gov/content/visas/en/general/all-visa-categories.html (last visited June 6, 2017). The INA leaves no doubt that the State's interests in student- and employment-based visa petitions for its students and faculty are related to the basic purposes of the INA.

The State's interest in effectuating its refugee resettlement policies and programs also falls within the zone of interests protected by the INA. *See* 8 U.S.C. § 1101(a)(42) (defining "refugees"); *id.* § 1157 (providing the procedure for determining the number of refugee admissions). These provisions of the INA were amended to provide a "systematic procedure" for the admission of refugees into the United States, as well as "uniform provisions for the effective resettlement and absorption of those refugees who are admitted." Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102 (1980). The State argues that EO2 upsets this finely-tuned system devised by Congress.

We conclude that Plaintiffs' claims of injury as a result of the alleged statutory violations are, at the least, "*arguably* within the zone of interests" that the INA protects.[7] *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1303

[7] The Government also argues that third party prudential standing limitations counsel against this court deciding Plaintiffs' Establishment Clause claim. To the extent this argument applies to Plaintiffs' INA-based statutory claim, we reject it because Plaintiffs have shown that they have suffered injuries as a result of EO2.

(2017) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

Plaintiffs have standing to assert their INA-based statutory claim that EO2 exceeds the scope of the President's authority under the INA and conflicts with various INA provisions.

B

The Government next argues that Plaintiffs' claims are speculative and not ripe. "Ripeness is peculiarly a question of timing, designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009) (internal quotations marks and alteration omitted). "Our role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000).

We are unpersuaded by the Government's arguments that *until* a student or faculty member requests a waiver and it is denied, or *until* Dr. Elshikh's mother-in-law requests a waiver and she is denied,[8] Plaintiffs injuries are not ripe because

[8] The Government needlessly argues that travel conditions in Syria make it speculative that Dr. Elshikh's mother-in-law would have made her application

they assume "contingent future events that may not occur." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted)).

Although the waiver may, in theory, provide students, visiting faculty members, or Dr. Elshikh's mother-in-law an opportunity to obtain visas, the waiver is discretionary. Indeed, no one can count on it. The Order poses hardships to nationals from the six designated countries by barring throughout the suspension period their ability to obtain visas. The waiver provision neither guarantees that waivers will be granted nor provides a process for applying for a waiver; moreover, the ultimate decision is clearly committed to a consular officer's discretion. *See* 82 Fed. Reg. at 13214 ("Case-by-case waivers *could be appropriate* in circumstances such as the following . . . .") (emphasis added); *id.* at 13219 (stating that nothing in the Order provides any "enforceable" rights). The discretionary waiver is not "a sufficient safety valve," *Washington*, 847 F.3d at 1169, and is a far cry from the "contingent future" argued by the Government. Here, nationals from the six designated countries, including Dr. Elshikh's mother-in-law and students who have accepted, or been offered, admission to the University of Hawai'i, are burdened by EO2 because they are not permitted entry,

interview scheduled for May 24, 2017. This argument does not diminish Dr. Elshikh's argument that the Order's suspension of entry of nationals from the six designated countries creates a significant obstacle to reuniting his mother-in-law with him and his family.

and whether they might obtain a waiver is speculative and at the discretion of a consular officer or a Customs and Border Protection official. *See* 82 Fed. Reg. at 13214.

We decline the Government's invitation to wait until Plaintiffs identify a visa applicant who was denied a discretionary waiver to assess whether Plaintiffs have shown a likelihood of success on the merits of their claims. Regardless of whether Dr. Elshikh's mother-in-law or the University's prospective students and faculty members might conceivably obtain such a waiver, they will face substantial hardship if we were to first require that they try to obtain a waiver before we will consider their case. *Cf. Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). We conclude that the claim is ripe for review.

C

Finally, the Government renews the argument it made before this court in *Washington v. Trump* that we may not review EO2 because the consular nonreviewability doctrine counsels that the decision to issue or withhold a visa is not subject to judicial review. *See Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986) ("[I]t has been consistently held that the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review."). We reject this argument.

Plaintiffs do not seek review of an individual consular officer's decision to

grant or to deny a visa pursuant to valid regulations, which could implicate the consular nonreviewability doctrine. Plaintiffs instead challenge "the President's *promulgation* of sweeping immigration policy." *Washington*, 847 F.3d at 1162. Courts can and do review both constitutional and statutory "challenges to the substance and implementation of immigration policy." *Id.* at 1163; *see, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88 (1993) (addressing the merits of a challenge that an executive order violated the INA and the United Nations Convention Relating to the Status of Refugees); *INS v. Chadha*, 462 U.S. 919, 940–41 (1983) (addressing whether a section of the INA that authorized one House of Congress to invalidate a decision of the Executive to allow a deportable alien to remain in the United States was unconstitutional).

This case is justiciable because Plaintiffs seek judicial review of EO2, contending that EO2 exceeds the statutory authority delegated by Congress and constitutional boundaries. "This is a familiar judicial exercise." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). We reject the Government's argument that the Order is not subject to judicial review. Although "[t]he Executive has broad discretion over the admission and exclusion of aliens, [] that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and

constitutional boundaries lie." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987).

Whatever deference we accord to the President's immigration and national security policy judgments does not preclude us from reviewing the policy at all. *See Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) ("[D]eference does not mean abdication."); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) ("Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role.").

We do not abdicate the judicial role, and we affirm our obligation "to say what the law is" in this case. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). We turn to the merits of the appeal of the preliminary injunction order.

IV

A

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20. We may affirm the district court's entry of the

preliminary injunction "on any ground supported by the record." *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011).

B

We consider whether Plaintiffs are entitled to preliminary relief based on the likelihood that EO2 violates the INA.[9] First, we address whether the President complied with the conditions set forth in § 1182(f), which are necessary for invoking his authority. We next address the conflicts between EO2 and other provisions of the INA.

1

Under Article I of the Constitution, the power to make immigration laws "is entrusted exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954); *see* U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . ."); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more

[9] This claim looks at whether the President appropriately exercised his authority under § 1182(f) by satisfying its precondition, and whether, and to what extent, his authority under § 1182(f) is cabined by other provisions of the INA. Because this challenge does not look at whether "the Executive exercises this [delegated and conditional exercise of] power *negatively*," *Mandel*, 408 U.S. at 770 (emphasis added), nor involves a constitutional challenge by a citizen to a visa denial on the basis of congressionally enumerated standards, *id.* at 769–70, but rather looks at whether the President exceeded the scope of his delegated authority, we do not apply *Mandel*'s "facially legitimate and bona fide reason," *id.*, standard. *See Sale*, 509 U.S. at 166–77 (reviewing whether the executive order complied with the INA without reference to *Mandel*'s standard).

complete than it is over the admission of aliens." (internal quotation marks omitted)); *id.* at 796 ("The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification . . . have been recognized as matters solely for the responsibility of the Congress . . . ." (internal quotation marks omitted)).

In the INA of 1952, Congress delegated some of its power to the President through Section 212(f), which provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f).

In Section 2(c) of the Order, the President invokes this power along with § 1185(a)[10] to suspend for 90 days the entry of nationals from the six designated

[10] Section 1185(a)(1) states:

> Unless otherwise ordered by the President, it shall be unlawful—
> (1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe[.]

8 U.S.C. § 1185(a)(1). The Government does not argue that § 1185(a)(1) provides an independent basis for the suspension of entry. Because, here, this section does not grant the President a meaningfully different authority than § 1182(f), and

countries. *See* 82 Fed. Reg. at 13213. In Section 6(a) of the Order, the President invokes neither section to suspend travel of refugees and to suspend decisions on applications for refugee status for 120 days, but, in Section 6(b), the President invokes § 1182(f) to cap refugee admissions at 50,000 for the 2017 fiscal year. *Id.* at 13215–16.

The parties dispute whether EO2 falls clearly within the President's congressionally delegated authority. To be sure, § 1182(f) gives the President broad authority to suspend the entry of aliens or classes of aliens. However, this authority is not unlimited. *Cf. Kent v. Dulles*, 357 U.S. 116, 129 (1958) ("[I]f that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests."); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("[L]egislative action is not a forbidden delegation of legislative power" if Congress provides an "intelligible principle to which the person or body authorized . . . is directed to conform."). Section 1182(f) requires that the President *find* that the entry of a class of aliens into the United States *would be detrimental* to the interests of the United States.[11] This section requires that the

because § 1182(f) specifically provides for the President's authority to suspend entry, our analysis proceeds under § 1182(f), understanding that the "reasonable rules, regulations, and orders" the President prescribes would need to, at a minimum, align with the President's authority under § 1182(f).

[11] We construe the term "detrimental" to have its common-sense, dictionary definition. Detrimental is defined as "causing loss or damage; harmful, injurious,

President's findings support the conclusion that entry of all nationals from the six designated countries, all refugees, and refugees in excess of 50,000 would be harmful to the national interest. There is no sufficient finding in EO2 that the entry of the excluded classes would be detrimental to the interests of the United States.

i

Section 2(c) declares that "the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States" and directs that the entry of nationals from those designated countries be barred for 90 days. 82 Fed. Reg. at 13213. The provision bans more than 180 million people from entry based on their national origin, including nationals who may have never been physically present in those countries. *See* Brief of Former National Security Officials as Amici Curiae, Dkt. No. 108 at 17. Section 2(c) states:

> [1] To temporarily reduce investigative burdens on relevant agencies during the review period [of the United States' vetting procedures], [2] to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, [3] to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and [4] in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. [§§] 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals

hurtful." *Detrimental*, Oxford English Dictionary, http://www.oed.com/view/Entry/51332?redirectedFrom=detrimental#eid. Throughout the opinion, in addition to the term "detrimental," we also use its synonyms "harmful" and "injurious."

> of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended.

82 Fed. Reg. at 13213. The Government explains that the Order's objective "is to address the risk that potential terrorists might exploit possible weaknesses in the Nation's screening and vetting procedures while the review of those procedures is underway."

We reject the first three reasons provided in Section 2(c) because they relate to preservation of government resources to review existing procedures and ensure adequate vetting procedures. There is no finding that present vetting standards are inadequate, and no finding that absent the improved vetting procedures there likely will be harm to our national interests. These identified reasons do not support the conclusion that the entry of nationals from the six designated countries would be harmful to our national interests.

We turn to the fourth reason—national security concerns—and examine whether it confers a legally sufficient basis for the President's conclusion that the nationality-based entry restriction is warranted. Section 1(d) of the Order explains that nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen warrant additional scrutiny because:

> Each of these *countries* is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important

> information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these *countries* of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these *countries* typically delay issuing, or refuse to issue, travel documents.

Id. at 13210 (emphasis added).

Because of these country conditions, the Order concludes that "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." *Id.* at 13211. The Order further indicates that "hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States[,]" but does not identify the number of nationals from the six designated countries who have been so convicted.[12] *See id.* at 13212.

The Order makes no finding that nationality alone renders entry of this broad class of individuals a heightened security risk to the United States. *See Int'l*

[12] Amicus Cato Institute explains that over the past decade and a half, only twenty-six nationals from the six designated countries have been convicted for any kind of terrorism offense, and that only four nationals from the six designated countries have been convicted of attempting or plotting a terrorist attack in the United States in that time frame. Brief of the Cato Institute as Amicus Curiae, Dkt. No. 170 at 11–12. Since the September 11, 2001 attacks, twelve people have succeeded in carrying out fatal domestic terrorist attacks—none committed by nationals from the six designated countries in EO2. *See* Brief of Foundation of Children of Iran and Iranian Alliance Across Borders as Amici Curiae, Dkt. No. 77 at 23.

Refugee Assistance Project, 2017 WL 2273306, at *31 (Keenan, J., concurring in part and concurring in the judgment) ("[T]he Second Executive Order does not state that any *nationals* of the six identified countries, *by virtue of their nationality*, intend to commit terrorist acts in the United States or otherwise pose a detriment to the interests of the United States.").

The Order does not tie these nationals in any way to terrorist organizations within the six designated countries. It does not identify these nationals as contributors to active conflict or as those responsible for insecure country conditions. It does not provide any link between an individual's nationality and their propensity to commit terrorism or their inherent dangerousness.[13] In short,

[13] Former Presidents have invoked § 1182(f) under non-exigent circumstances to address compromised security conditions abroad but have tied exclusions to the culpable conduct of barred aliens, such as aliens who contributed to a country's situation in a specified way or were members of particular narrowly defined and/or dangerous groups. *See* Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief* 6–10, Congressional Research Service (2017) (listing categories of aliens excluded under 8 U.S.C. § 1182(f)); *see also* 9 *Foreign Affairs Manual* § 302.14-3(B)(1)(b) (2016), https://fam.state.gov/FAM/09FAM/09FAM030214.html (stating that executive orders issued under § 1182(f) have typically applied to "individuals"; have sometimes been "based on affiliation"; and otherwise have suspended entry "based on objectionable conduct"); Brief of Former Federal Immigration and Homeland Security Officials as Amici Curiae, Dkt. No. 176 at 18–19 ("None of the Executive actions cited elsewhere by the Government, nor any others known to amici, invoked § 1182(f) to suspend entry from one or more countries based on the assumption that nationals from those countries were inherently dangerous." (footnotes omitted)). President Obama's Executive Order 13726, for example, suspended the entry into the United States of persons who

the Order does not provide a rationale explaining why permitting entry of nationals from the six designated countries under current protocols would be detrimental to the interests of the United States.[14]

were responsible or complicit in particular actions or policies that threaten the stability of Libya. *See* 81 Fed. Reg. 23559 (Apr. 19, 2016).

In two instances, former Presidents have distinguished classes of aliens on the basis of nationality. But these distinctions were made not because of a particular concern that entry of the individuals themselves would be detrimental, but rather, as retaliatory diplomatic measures responsive to government conduct directed at the United States. For example, President Carter's proclamation barring the future entry of Iranians occurred during the exigent circumstance of the Iranian hostage crisis. This was one of many sanctions imposed to increase political pressure on the Iranian government to ensure the safe return of American hostages. *See* Exec. Order 12172, 44 Fed. Reg. 67947 (Nov. 26, 1979), *amended by* Exec. Order 12206, 45 Fed. Reg. 24101 (Apr. 7, 1980); President Jimmy Carter, *Sanctions Against Iran Remarks Announcing U.S. Actions*, The American Presidency Project (Apr. 7, 1980), http://www.presidency.ucsb.edu/ws/?pid=33233%20. President Reagan's suspension of entry of certain Cuban nationals as immigrants came as a response to the Cuban government's own suspension of "all types of procedures regarding the execution" of an immigration agreement between the United States and Cuba, which had "disrupt[ed] normal migration procedures between the two countries." *See* Proclamation No. 5517, 51 Fed. Reg. 30470 (Aug. 22, 1986).

[14] Indeed, the President recently confirmed his assessment that it is the "countries" that are inherently dangerous, rather than the 180 million individual nationals of those countries who are barred from entry under the President's "travel ban." *See* Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 6:20 PM), https://twitter.com/realDonaldTrump/status/871899511525961728 ("That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!") (emphasis in original); *see also* Elizabeth Landers, White House: Trump's tweets are "official statements", CNN (June 6, 2017, 4:37 PM), http://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/ (reporting the White House Press Secretary's confirmation that the President's tweets are "considered official statements by the President of the United States").

The Order's discussion of country conditions fails to bridge the gap. Indeed, its use of nationality as the sole basis for suspending entry means that nationals without significant ties to the six designated countries, such as those who left as children or those whose nationality is based on parentage alone, should be suspended from entry. Yet, nationals of other countries who do have meaningful ties to the six designated countries—and may be contributing to the very country conditions discussed—fall outside the scope of Section 2(c). Consequently, EO2's focus on nationality "could have the paradoxical effect of barring entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war." *Hawai'i TRO*, 2017 WL 1011673, at *15 (internal quotation marks and alterations omitted); *see also* Brief of the Cato Institute as Amicus Curiae, Dkt. No. 170 at 14–15 (providing statistics on nationals of the designated countries living in other countries as migrants, refugees, or asylum seekers and explaining that Syrian and Iranian nationals do not gain nationality by virtue of their place of birth).

Although the Order explains that country conditions in the six designated countries lessen their governments' ability to share information about nationals seeking to travel to our country, the Order specifically avoids making any finding

We take judicial notice of President Trump's statement as the veracity of this statement "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

that the current screening processes are inadequate. As the law stands, a visa applicant bears the burden of showing that the applicant is eligible to receive a visa or other document for entry and is not inadmissible. *See* 8 U.S.C. § 1361. The Government already can exclude individuals who do not meet that burden. *See id.* The Order offers no further reason explaining how this individualized adjudication process is flawed such that permitting entry of an entire class of nationals is injurious to the interests of the United States.

Finally, the Order relies on 8 U.S.C. § 1187(a)(12) to explain why the six countries have been designated. 82 Fed. Reg. at 13210. In § 1187(a)(12), Congress prevented use of the Visa Waiver Program by dual nationals of, or those who have visited in the last six years, (1) Iraq and Syria, (2) any country designated by the Secretary of State as a state sponsor of terrorism, and (3) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence. Rather than setting an outright ban on entry of nationals from these countries, Congress restricted access to the tourist Visa Waiver Program and instead required that persons who are nationals of or have recently traveled to these countries enter the United States with a visa. This provision reflects Congress's considered view on similar security concerns that the Order seeks to address. *See Chadha*, 462 U.S. at 951, 959 (explaining that our founders "consciously" chose to

place the legislative process in the hands of a "deliberate and deliberative" body). The Order identifies no new information to justify Section 2(c)'s blanket ban as contrasted with § 1187(a)(12)'s restriction from the Visa Waiver Program. Moreover, relying on § 1187(a)(12) alone, which requires that aliens from these countries undergo vetting through visa procedures, does not explain why their *entry* would be detrimental to the interests of the United States. To the contrary, it effectively negates the Order's statement of detriment—that the "*unrestricted* entry into the United States of nationals [of the six designated countries] would be detrimental to the interests of the United States." 82 Fed. Reg. at 13213 (emphasis added). Section 1187(a)(12) dictates that the entry of individuals covered by the Order is never "unrestricted."

In conclusion, the Order does not offer a sufficient justification to suspend the entry of more than 180 million people on the basis of nationality. National security is not a "talismanic incantation" that, once invoked, can support any and all exercise of executive power under § 1182(f). *United States v. Robel*, 389 U.S. 258, 263–64 (1967); *see also Korematsu v. United States*, 323 U.S. 214, 235 (1944) (Murphy, J., dissenting) ("[T]he exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or

experience could be marshalled in support of such an assumption."). Section 1182(f) requires that the President exercise his authority only after meeting the precondition of finding that entry of an alien or class of aliens *would be* detrimental to the interests of the United States. Here, the President has not done so.

ii

Section 6(a) suspends travel of refugees into the United States under USRAP and suspends decisions on applications for refugee status for 120 days but does not specifically announce that the entry of refugees would be detrimental to the interests of the United States. 82 Fed. Reg. at 13215.

Assuming the President also relied on § 1182(f) to suspend USRAP for 120 days, EO2 provides the following information to possibly support the conclusion that refugee admissions would injure the national interest. First, EO2 explains that the screening and vetting procedures associated with USRAP "play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States," and that it is the policy of the United States to improve screening and vetting procedures associated with USRAP. *Id.* at 13209. Section 1(h) cites two examples of refugees who have been convicted of terrorism-related crimes in the United States:

> [1] [I]n January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in

> prison, respectively, for multiple terrorism-related offenses.[15]
> [2] [I]n October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction . . . .[16]

82 Fed. Reg. at 13212. Section 1(h) also explains that there are "more than 300 persons who entered the United States as refugees [who] are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation." *Id.*

EO2 does not reveal any threat or harm to warrant suspension of USRAP for 120 days and does not support the conclusion that the entry of refugees in the interim time period would be harmful. Nor does it provide any indication that present vetting and screening procedures are inadequate.[17] Instead, EO2 justifies

[15] These two Iraqi nationals pleaded guilty to federal terrorism charges for engaging in terrorism against Americans overseas and providing material support to foreign terrorists and did not face charges for planning a domestic terrorist attack. *See* Press Release: Former Iraqi Terrorists Living in Kentucky Sentenced for Terrorist Activities, U.S. Dep't of Justice, https://www.justice.gov/opa/pr/former-iraqi-terrorists-living-kentucky-sentenced-terrorist-activities (Jan. 29, 2013) (last visited June 6, 2017).

[16] This Somali national entered the United States at the age of three in approximately 1994; the conduct underlying his conviction occurred in 2010 when he was nineteen years old. *See United States v. Mohamud*, 843 F.3d 420, 423 (9th Cir. 2016). His background is consistent with DHS's report that most foreign-born, U.S.-based violent extremists are "likely radicalized several years *after* their entry to the United States," thus "limiting the ability of screening and vetting officials to prevent their entry because of national security concerns" (emphasis added).

[17] Refugees receive the most thorough vetting of all travelers to the United States in a process that takes eighteen to twenty-four months. By the time refugees are approved for resettlement in the United States, they have been reviewed by the

the 120-day suspension as a review period of USRAP application and adjudication processes. 82 Fed. Reg. at 13215. The Government reiterates that the President directed the suspension "in order to allow the Secretary of State to review application and adjudication processes." These explanations do not support a finding that the travel and admission of refugees would be detrimental to the interests of the United States.

iii

Section 6(b) of EO2 restricts entry of refugees to no more than 50,000 in the 2017 fiscal year because entry in excess of 50,000 "would be detrimental to the interests of the United States." 82 Fed. Reg. at 13216. But in accordance with 8 U.S.C. § 1157, President Obama previously determined that the admission of 110,000 refugees to the United States during fiscal year 2017 was justified by humanitarian concerns or otherwise in the national interest. *See* Presidential Determination on Refugee Admissions for Fiscal Year 2017, Presidential Determination No. 2016-13, 81 Fed. Reg. 70315 (Sept. 28, 2016); *see also* Proposed Refugee Admissions for Fiscal Year 2017: Report to the Congress,

United Nations High Commissioner for Refugees, the National Counterterrorism Center, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of Defense, the Department of State, and the U.S. intelligence community. *See* Brief of Former National Security Officials as Amici Curiae, Dkt. No. 108 at 14–16.

https://www.state.gov/documents/organization/262168.pdf.[18]

To the extent that 60,000 additional refugees can be considered a class of aliens, EO2 makes *no* findings to justify barring entry in excess of 50,000 as detrimental to the interests of the United States. EO2 gives no explanation for why the 50,001st to the 110,000th refugee would be harmful to the national interest, nor does it specify any further threat to national security. And there is not any rationale explaining why the previous target admission of 110,000 refugees this fiscal year was justified by humanitarian concerns or otherwise in the national interest, *see* 8 U.S.C. § 1157(a)(2), but that the entry of more than 50,000 refugees this same fiscal year would be detrimental to the national interest. Here too, the President did not meet the statutory precondition of exercising his authority under § 1182(f) to cap refugee admissions.

The actions taken in Sections 2 and 6 require the President first to make sufficient findings that the entry of nationals from the six designated countries and the entry of all refugees would be detrimental to the interests of the United States. We conclude that the President did not satisfy this precondition before exercising his delegated authority. Plaintiffs have shown a likelihood of success on the merits

[18] As of May 31, 2017, the United States has admitted 46,403 refugees in the 2017 fiscal year. U.S. Dep't of State, Bureau of Population, Refugees, and Migration, Refugee Admissions Report (2017), http://www.wrapsnet.org/admissions-and-arrivals (last visited June 6, 2017).

of their claim that the President exceeded his authority under §§ 1182(f) and 1185(a).

2

Plaintiffs contend that Section 2(c) of the Order violates the INA because it discriminates on the basis of nationality, thus violating the non-discrimination mandate of § 1152(a)(1)(A) of the INA. They argue that although the President is given broad authority under § 1182(f), this authority is restrained by § 1152(a)(1)(A).

Contemporaneous to enacting the Civil Rights Act of 1964 and the Voting Rights Act of 1965, Congress passed the INA of 1965 to eliminate the "national origins system as the basis for the selection of immigrants to the United States." H.R. Rep. No. 89-745, at 8 (1965). Section 1152(a)(1)(A) was enacted as part of that act, and provides:

> [N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, *nationality*, place of birth, or place of residence.

8 U.S.C. § 1152(a)(1)(A) (emphasis added). Section 1152(a)(1)(A) contains specific exemptions, and § 1182(f) is not among them.

The Government tries to reconcile the Order's Section 2(c) with § 1152(a)(1)(A) by arguing that Section 2(c) bars *entry* of nationals from the six designated countries but does not deny the *issuance of immigrant visas* based on

nationality. EO2's suspension of entry on the basis of nationality, however, in substance operates as a ban on visa issuance on the basis of nationality. The Order's text confirms as much. Its primary purpose is to evaluate screening and vetting procedures associated with the visa issuance process. 82 Fed. Reg. at 13209. EO2 affects nationals of the six designated countries who were outside of the United States on the effective date of the Order but did not have a valid visa at specific times, such as the effective date of EO1. 82 Fed. Reg. at 13213. Further, it provides for a waiver so consular officers or Customs and Border Protection officials may authorize the issuance of visas during the suspension period. *Id.* at 13214. The Government also stresses that it should not be required to issue visas for aliens who are validly barred from entry, explaining that "[r]equiring that such aliens be issued visas permitting them to travel to this country, only to be denied entry upon arrival, would create needless difficulties and confusion." Indeed, the Government clarified at oral argument that as a practical matter, the entry ban would be implemented through visa denials. Moreover, the statute makes clear that aliens deemed inadmissible under § 1182, including under § 1182(f) "are ineligible to receive visas," thus confirming the substantial overlap between a denial of entry under § 1182(f) and a visa denial. *See* 8 U.S.C. § 1182(a); *see also Int'l Refugee Assistance Project*, 2017 WL 2273306, at *52 (Thacker, J., concurring) (explaining that the Government's "own arguments and the text and

operation of [EO2] belie [the] notion" that the visa issuance process is a different activity than suspension of entry).

We cannot blind ourselves to the fact that, for nationals of the six designated countries, EO2 is effectively a ban on the issuance of immigrant visas. If allowed to stand, EO2 would bar issuance of visas based on nationality in violation of § 1152(a)(1)(A). The Government did not dispute this point at oral argument, and it stands to reason that the whole system of the visa issuance would grind to a halt for nationals of the six designated countries whose entry is barred from the United States. Issuance of visas will automatically stop for those who are banned based on nationality. Yet Congress could not have used "more explicit language" in "unambiguously direct[ing] that no nationality-based discrimination shall occur." *Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 473.

The Government additionally argues that § 1152(a)(1)(A) does not displace the President's preexisting authority under § 1182(f), because the President may validly bar *entry* and the non-discrimination mandate applies strictly to the *issuance of visas*. Based on the plain statutory text, the Government contends that the non-discrimination mandate of § 1152(a)(1)(A) does not reach the President's suspension of entry under § 1182(f).

This argument, however, presents a clear conflict between § 1152(a)(1)(A) and § 1182, because it would enable the President to restore discrimination on the

basis of nationality that Congress sought to eliminate. It is our duty, if possible, to reconcile the President's statutory authority under § 1182(f) with the non-discrimination mandate of § 1152(a)(1)(A). We begin with the instruction that "all parts of a statute, if at all possible, are to be given effect." *Weinberger v. Hyson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973); *accord Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . fit, if possible, all parts into an harmonious whole." (internal citation and quotation marks omitted)). We also look "to the design of the statute as a whole and to its object and policy." *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) (quoting *Crandon v. United States,* 494 U.S. 152, 158 (1990)).

Under the Government's argument, the President could circumvent the limitations set by § 1152(a)(1)(A) by permitting the issuance of visas to nationals of the six designated countries, but then deny them entry. Congress could not have intended to permit the President to flout § 1152(a) so easily. *See Dada v. Mukasey*, 554 U.S. 1, 16 (2008) (courts should not read statutes in such a way that renders them a "nullity" or is "unsustainable").

To avoid this result, and to give effect to § 1152(a)(1)(A), the section "is best read to prohibit discrimination throughout the visa process, which must include the decision whether to admit a visa holder upon presenting the visa." Brief of Former Immigration and Homeland Security Officials as Amici Curiae,

Dkt. No. 176 at 9. In prohibiting nationality-based discrimination in the issuance of immigrant visas, Congress also in effect prohibited nationality-based discrimination in the admission of aliens. "Congress could not have intended to prohibit discrimination at the embassy, but permit it at the airport gate." Brief of Technology Companies as Amici Curiae, Dkt. No. 180 at 20. We do not suggest that visa holders must gain automatic entry into the United States, but rather, that visa holders cannot be discriminated against on the basis of "race, sex, nationality, place of birth, or place of residence" throughout the visa process, whether during the issuance of a visa or at the port of entry.[19]

Our conclusion that § 1152(a)(1)(A)'s non-discrimination mandate cabins the President's authority under § 1182(f) is reinforced by other canons of statutory construction.

First, a later enacted, more specific statute generally governs over an earlier, more general one. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183–87 (2012). Here, § 1152(a)(1)(A) was enacted in 1965, after § 1182(f) was enacted in 1952. Section 1152(a)(1)(A) is also more

[19] While a foreign national may properly obtain a visa, this does not guarantee entry into the United States because they may otherwise be inadmissible. *See* 8 U.S.C. § 1201(h) ("Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted to the United States."); *see also* 8 U.S.C. § 1182 (listing the myriad ways an alien can be deemed inadmissible).

specific, and sets a limitation on the President's broad authority to exclude aliens—he may do so, but not in a way that discriminates based on nationality. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.").

Second, § 1152(a)(1)(A) specifically identifies exemptions from the non-discrimination mandate, implying that unmentioned sections are not exempted. *See United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001) ("The logic that invests the omission with significance is familiar: the mention of some implies the exclusion of others not mentioned."). Section 1152(a)(1)(A) explicitly exempts three different INA provisions from its application—8 U.S.C. §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153—all of which deal with giving preference to certain immigrants, such as family members of current citizens and permanent residents. Had Congress likewise intended to permit § 1182(f) to override § 1152(a)(1)(A)'s non-discrimination requirement, it would have done so in the same way it did for the other provisions.

The Government contends that §§ 1182(f) and 1185(a)(1) "have long been understood to permit the president to draw nationality-based distinctions."

However, as discussed above, *supra* note 13, prior executive orders and proclamations did not suspend classes of aliens on the basis of national origin, but instead on the basis of affiliation or culpable conduct. *See* Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief* 6–10, Congressional Research Service (2017). The other instances cited by the Government are distinguishable. The executive order at issue in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), made no nationality-based distinctions and concerned "suspend[ing] the entry of aliens coming by sea to the United States without necessary documentation." Exec. Order No. 12807, 57 Fed. Reg. 23133 (May 24, 1992). President Carter's executive orders in response to the Iranian hostage crisis delegated authority to the Secretary of State and the Attorney General to prescribe limitations governing the entry of Iranian nationals and did not ban Iranian immigrants outright. *See* Exec. Order 12172, 44 Fed. Reg. 67947 (Nov. 26, 1979), *amended by* Exec. Order 12206, 45 Fed. Reg. 24101 (Apr. 7, 1980). Finally, President Reagan's Proclamation 5517 suspended the entry of Cuban nationals coming as immigrants, with some exceptions. 51 Fed. Reg. 30470 (Aug. 22, 1986). The proclamation did not exclude all foreign nationals, as exceptions were provided, and the proclamation was in response to Cuba's decision "'to suspend all types of procedures regarding the execution' of the December 14, 1984,

immigration agreement between the United States and Cuba."[20] *Id.* To be clear, Presidents have invoked §§ 1182(f) and 1185(a)(1) to restrict certain aliens or classes of aliens from entering the United States, but EO2 is unprecedented in its scope, purpose, and breadth.

The Government also argues that the President may engage in discrimination on the basis of nationality because of the exception provided in § 1152(a)(1)(B). Section 1152(a)(1)(B) provides, "[n]othing in [§ 1152(a)(1)(A)] shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed." However, this provision governs the Secretary of State's manner and place for processing applications, not the President's asserted ability to deny immigrant visas on the basis of nationality.

Having considered the President's authority under § 1182(f) and the non-discrimination mandate of § 1152(a)(1)(A), we also conclude that Plaintiffs have shown a likelihood of success on the merits of their claim that Section 2(c) of the Order, in suspending the issuance of immigrant visas and denying entry based on nationality, exceeds the restriction of § 1152(a)(1)(A) and the overall statutory

[20] Because these executive actions were not challenged as violations of § 1182(f) or § 1152(a)(1)(A), "the judiciary [has not] address[ed] whether the order[s] complied with those provisions or the Constitution." *Int'l Refugee Assistance Project*, 2017 WL 2273306, at *45 n.11 (Wynn, J., concurring).

scheme intended by Congress.

3

Aside from the President's failure to make the requisite findings to justify reducing the entry of refugees in fiscal year 2017 as an exercise of authority under § 1182(f), Plaintiffs contend that 8 U.S.C. § 1157 circumscribes the President's actions in setting the number of refugees to be admitted this fiscal year. We agree.

The Refugee Act of 1980 amended the INA "to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted." Pub. L. No. 96-212, § 101, 94 Stat. 102 (1980).

The Act requires that the President, after consulting with Congress, set the annual admission of refugees before the beginning of every fiscal year:

> [T]he number of refugees who may be admitted under this section in any fiscal year . . . shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

8 U.S.C. § 1157(a)(2). "Appropriate consultation" is defined as "discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives." *Id.* § 1157(e). After undergoing this process in 2016, President

Obama determined that the admission of 110,000 refugees to the United States during fiscal year 2017 was justified by humanitarian concerns or otherwise in the national interest. *See* 81 Fed. Reg. at 70315. Section 6(b) of EO2 reduced the refugee admission cap for the same year to 50,000. *See* 82 Fed. Reg. at 13216.

The statute requires the President to set the number of annual refugee admissions (1) before the start of the new fiscal year, and (2) after appropriate consultation with Congress. The Government responds that § 1157 only refers to a ceiling—not the floor—for the number of refugees who may be admitted, and that §§ 1182(f) and 1185(a)(1) permit the President to lower the number of refugees permitted to enter.

We disagree. This interpretation reads out the language that the number of refugees who may be admitted *shall be* the number determined by the President. *See* 8 U.S.C. § 1157(a)(2). The Government's argument would require us to conclude that Congress set forth very specific requirements for the President to provide the number and allocation of the refugees to be admitted as justified by humanitarian concerns or the national interest, after appropriate consultation, only to permit the President to order a midyear reduction in the level of refugee admissions, and to do so without consulting Congress. Section 1157 contemplates that the President, after consultation with Congress, may *increase* the number of refugees admitted in the middle of the fiscal year, but does not provide a

mechanism for the President to *decrease* the number of refugees to be admitted mid-year. *See id.* § 1157(b) (describing how, after appropriate consultation, the President may fix a number of additional refugees to be admitted to the United States).

Well-settled interpretive canons further explain why § 1182(f) does not give the President authority to override the requirements of § 1157. First, applying the "later in time" canon, § 1182(f) was adopted in 1952, and § 1157 was adopted in 1980, indicating that this subsequent statute shapes the scope of the President's authority. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 143 ("The 'classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.'" (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988))).

Second, § 1157, the more specific provision, controls the more general § 1182(f). *See id.* ("This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand."); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Section 1157 provides a very specific process for "appropriate consultation" that the President must follow before setting the number of refugees to be admitted to the United States that is justified by humanitarian concerns or is otherwise in the national

interest. "Appropriate consultation" requires in-person discussions between cabinet-level representatives and members of Congress "to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, [and] to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest . . . ." 8 U.S.C. § 1157(e). As part of the consultation, the Executive also must present the following information:

> (1) A description of the nature of the refugee situation.
> (2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.
> (3) A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement.
> (4) An analysis of the anticipated social, economic, and demographic impact of their admission to the United States.
> (5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees.
> (6) An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States.
> (7) Such additional information as may be appropriate or requested by such members.

Id. According to the statute, this information would ideally be provided at least two weeks in advance of the discussions. *Id.*

Congress prescribed specific actions the President must take before setting the number of refugees who may be admitted as justified by humanitarian concerns

or as otherwise in the national interest. *See generally* 8 U.S.C. § 1157. The President relied on § 1182(f)—an earlier and more general provision—to conclude that admission of refugees above 50,000 is detrimental to the interest of the United States. But § 1157, a "narrow, precise, and specific" statutory provision, may not be overridden by § 1182(f), a provision "covering a more generalized spectrum" of issues. *Radzanower*, 426 U.S. at 153–54; *see also Nitro–Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 504 (2012) (explaining that the interpretive principle *generalia specialibus non derogant* means that "the specific governs the general" and applies to conflict between "laws of equivalent dignity").

As a result, Plaintiffs have also shown a likelihood of success on the merits for their argument that Section 6(b) of EO2 conflicts with 8 U.S.C. § 1157.

4

Plaintiffs additionally argue that EO2 conflicts with 8 U.S.C. § 1182(a)(3)(B), which sets forth detailed and "specific criteria for determining terrorism-related inadmissibility." *Din*, 135 S. Ct. at 2140.

EO2 attempts to eliminate the marginal risk of "erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts," 82 Fed. Reg. at 13211, by suspending entry of all nationals from the six designated countries. We need not decide the precise scope of § 1182(f) authority in relation to § 1182(a)(3)(B) because the President has not met the precondition to exercising

his power under § 1182(f), that is, of making a detrimentality finding. We note, however, that executive action should not render superfluous Congress's requirement that there be a "reasonable ground to believe" that an alien "is likely to engage after entry in any [specifically defined] terrorist activity," 8 U.S.C. § 1182(a)(3)(B)(i)(II), and other specific grounds for terrorism-related admissibility. *Cf. Abourezk*, 785 F.2d at 1049 n.2 ("The President's sweeping proclamation power [under § 1182(f)] provides a safeguard against the danger posed by any particular case or class of cases *that is not covered* by one of the categories in section 1182(a)." (emphasis added)); *Allende v. Shultz*, 845 F.2d 1111, 1118 (1st Cir. 1988) ("Each subsection [of § 1182(a)] creates a different and distinct ground for exclusion.").

5

Finally, we note that in considering the President's authority, we are cognizant of Justice Jackson's tripartite framework in *Youngstown Sheet & Tube Co. v. Sawyer*. *See* 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). Section 1182(f) ordinarily places the President's authority at its maximum. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635. However, given the express will of Congress through § 1152(a)(1)(A)'s non-discrimination mandate, § 1157's

procedure for refugee admissions to this country, and § 1182(a)(3)(B)'s criteria for determining terrorism-related inadmissibility, the President took measures that were incompatible with the expressed will of Congress, placing his power "at its lowest ebb." *Id.* at 637. In this zone, "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 638. We have based our decision holding the entry ban unlawful on statutory considerations, and nothing said herein precludes Congress and the President from reaching a new understanding and confirming it by statute. If there were such consensus between Congress and the President, then we would view Presidential power at its maximum, and not in the weakened state based on conflict with statutory law. *See id.* at 635–38.

* * *

In sum, we conclude that Plaintiffs have shown a likelihood of success on the merits at least as to their arguments that EO2 contravenes the INA by exceeding the President's authority under § 1182(f), discriminating on the basis of nationality, and disregarding the procedures for setting annual admissions of refugees.[21]

[21] Because this claim relates to EO2's conflict with the INA, we leave open whether and in what circumstances the President may suspend entry under his

C

The current record is sufficient to permit the court's evaluation of the irreparable harms threatening Plaintiffs. Plaintiffs identify harms, such as prolonged separation from family members, constraints to recruiting and attracting students and faculty members to the University of Hawai'i, decreased tuition revenue, and the State's inability to assist in refugee resettlement. Many of these harms are not compensable with monetary damages and therefore weigh in favor of finding irreparable harm. *See, e.g.*, *Washington*, 847 F.3d at 1169 (identifying harms such as harms to States' university employees and students, separated families, and stranded States' residents abroad); *Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 520 (9th Cir. 1984) (crediting intangible harms such as the "impairment of their ongoing recruitment programs [and] the dissipation of alumni and community goodwill and support garnered over the years"); *cf. Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503–04 (1977) (explaining that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition").

We conclude Plaintiffs are likely to suffer irreparable harm in the absence of

inherent powers as commander-in-chief or in a time of national emergency. *See, e.g.*, *Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 473.

preliminary relief.

D

In considering the equities of a preliminary injunction, we next "balance the competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24.

The district court did not abuse its discretion in finding that the balance of hardships tipped in Plaintiffs' favor. The Government argues that the injunction causes direct, irreparable injury by constraining the Executive's authority in "protect[ing] national security on behalf of the entire United States."[22] "[T]he Government's interest in combating terrorism is an urgent objective of the highest order." *Humanitarian Law Project*, 561 U.S. at 28. Nonetheless, the President must exercise his authority under § 1182(f) lawfully by making sufficient findings justifying that entry of certain classes of aliens would be detrimental to the national interest and ensuring that such exercise does not conflict with other INA

[22] To the extent the Government argues that it is injured simply by nature of the judiciary limiting the President's authority, *ipso facto*, when it argues that it suffered a "form of irreparable injury" because it was "enjoined by a court from effectuating statutes enacted by representatives of its people," we reject that argument. *See Robel*, 389 U.S. at 264 ("[The] concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of . . . power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart."); *see also Int'l Refugee Assistance Project*, 2017 WL 2273306, at *25 (rejecting the Government's "institutional injury" argument, as "even the President's actions are not above judicial scrutiny").

provisions. Because the President has not done so, we cannot conclude that national security interests outweigh the harms to Plaintiffs. *See Int'l Refugee Assistance Project*, 2017 WL 2273306, at *32 (Keenan, J., concurring in part and concurring in the judgment).

Further, the Government has not put forth evidence of injuries resulting from the preliminary injunction, or how the screening and vetting procedures in place before the Order was enjoined were inadequate such that the Order should take immediate effect. Continuing to enjoin portions of EO2 restores immigration procedures and programs to the position they were in prior to its issuance. *See Washington*, 847 F.3d at 1168; *see also* Brief of Former National Security Officials as Amici Curiae, Dkt. No. 108 at 9 (explaining that a number of amici officials, in office on January 20, 2017 and current on active intelligence, knew of no "credible terrorist threat streams directed against the United States" at that time).

In weighing the harms, the equities tip in Plaintiffs' favor.

E

Plaintiffs must finally show that preliminary injunctive relief is in the public interest.

National security is undoubtedly a paramount public interest. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling

than the security of the Nation.").[23] Although we recognize that "sensitive and weighty interests of national security and foreign affairs" are implicated, *Humanitarian Law Project*, 561 U.S. at 33–34, the President must nonetheless exercise his executive power under § 1182(f) lawfully. The public interest is served by "curtailing unlawful executive action." *Texas*, 809 F.3d at 187.

The public interests in uniting families and supporting humanitarian efforts in refugee resettlement support the conclusion that the public interest is served by preliminarily enjoining EO2 and maintaining the status quo. *Cf. Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("Public policy supports

[23] Several amici contend that the Order not only serves no national security interest, but actually harms our security. *See, e.g.*, Brief of Former National Security Officials as Amici Curiae, Dkt. No. 108 at 2 (explaining that the Order will harm the country's national security and foreign policy interest: "It will endanger troops in the field, and disrupt key counterterrorism and national security partnerships. It will aid the propaganda effort of the Islamic State in Iraq and the Levant ("ISIL") and support its recruitment message. By feeding the narrative that the United States is at war with Islam, the Order will impair relationships with the very Muslim communities that law enforcement professionals rely on to address the threat of terrorism. And it will have a damaging humanitarian and economic impact."); Brief of Former Federal Immigration and Homeland Security Officials as Amici Curiae, Dkt. No. 176 at 20–21 ("[T]he Order weakens vetting protocols and procedures by using national-origin discrimination as a substitute for individualized threat assessments. The Order also threatens to fracture critical military, intelligence, and counterterrorism partnerships and hinder cooperation with the very communities with which law enforcement professionals work to disrupt terrorist plots."); Brief of *Doe* Plaintiffs as Amici Curiae, Dkt. No. 276, Ex. G., U.S. Dep't of State, Dissent Channel: Alternatives to Closing Doors in Order to Secure Our Borders (voicing the State Department officers' concerns about EO1). A draft DHS report also concluded that citizenship "is unlikely to be a reliable indicator of potential terrorist activity."

recognition and maintenance of a family unit. The [INA] was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members."); *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980) (explaining that "the humane purpose" of the INA is to reunite families).

Amici also have identified specific harms that will result if EO2 takes effect, bolstering the conclusion that the injunction is in the public interest. They explain that EO2 would, *inter alia*: curtail children's ability to travel to the United States to obtain life-saving medical care, *see* Brief of the Foundation for the Children of Iran and Iranian Alliances Across Borders as Amici Curiae, Dkt. No. 77; undermine the efforts of religious organizations in the United States rendering humanitarian aid, *see* Brief of Episcopal Bishops as Amici Curiae, Dkt. No. 87; compromise the diversity interests that are central to universities, *see* Brief of New York University as Amicus Curiae, Dkt. No. 95; deter international students, faculty, and scholars from studying at American universities and harm the research mission of universities, *see* Brief of Colleges and Universities as Amici Curiae, Dkt. No. 97; impose additional hardship for child refugees already facing violence and trauma, *see* Brief of Professional Society on the Abuse of Children as Amicus Curiae, Dkt. No. 107; immediately harm refugees who will be denied entry and risk the vitality of entire refugee assistance programs and resettlement efforts, *see* Brief of

Interfaith Group of Religions and Interreligious Organizations as Amici Curiae, Dkt. No. 121, Brief of Oxfam America as Amicus Curiae, Dkt. No. 149, Brief of HIAS, IRC, and USCRI as Amici Curiae, Dkt. No. 155, Brief of *Doe* Plaintiffs as Amici Curiae, Dkt. No. 276; uniquely exclude Muslim family members, scholars, religious leaders, and professionals from entry, *see* Brief of Muslim Rights, Professional, and Public Health Organizations as Amici Curiae, Dkt. No. 124, Brief of Muslim Justice League et al. as Amici Curiae, Dkt. No. 207; inflict proprietary harms on the states by harming state colleges, disrupting staffing and research at state medical institutions, and reducing tax revenues and reinvestment of refugee funding into local economies, *see* Brief of Illinois et al. as Amici Curiae, Dkt. No. 125; undermine trust between law enforcement and immigrant communities and inflict financial and social costs, such as loss of tourism dollars, *see* Brief of Chicago et al. as Amici Curiae, Dkt. No. 137; interfere with union members' ability to do their work and serve the American public, *see* Brief of Service Employees International Union et al. as Amici Curiae, Dkt. No. 166; harm American competitiveness by disrupting ongoing business operations and inhibiting technology companies' abilities to attract talent, business, and investment to the United States, *see* Brief of Technology Companies as Amici Curiae, Dkt. No. 180, Brief of Massachusetts Technology Leadership Council as Amicus Curiae, Dkt. No. 194; place victims of gender-based violence at particular

risk, *see* Tahirih Justice Center et al. as Amici Curiae, Dkt. No. 185; interrupt foreign artists' exhibitions and performances in the United States, *see* Brief of the Association of Art Museum Directors et al. as Amici Curiae, Dkt. No. 204; and prevent U.S. citizens and lawful permanent residents from receiving visits from or reuniting with family members, *see* Brief of Human Rights First et al. as Amici Curiae, Dkt. No. 222.

The public interest favors affirming the preliminary injunction. *See Winter*, 555 U.S. at 24 ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

* * *

Plaintiffs have satisfied all four factors to warrant entry of the preliminary injunction. *See id.* at 20. The district court did not abuse its discretion in granting an injunction.

V

With respect to the injunction's scope, the Government contends that the district court erred by enjoining internal government procedures, giving nationwide relief, and entering an order against the President.

We review the scope of a preliminary injunction for abuse of discretion. *McCormack v. Hiedeman*, 694 F.3d 1004, 1010 (9th Cir. 2012). Although the

district court has "considerable discretion in fashioning suitable relief and defining the terms of an injunction," *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991), there are limitations on this discretion. Injunctive relief must be tailored to remedy the specific harms shown by the plaintiffs. *See id.* ("Injunctive relief . . . must be tailored to remedy the specific harm alleged."); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established . . . ."). "An overbroad injunction is an abuse of discretion." *Stormans*, 586 F.3d at 1140.

A

The Government first argues that the injunction improperly enjoins enforcement of parts of Sections 2 and 6 that are unrelated to any alleged harm to Plaintiffs—specifically, the provisions that pertain to internal government operations and procedures.

Portions of Section 2 require various agencies to conduct a review of worldwide vetting procedures to determine what additional information, if any, is needed from each foreign country to adjudicate a visa application, prepare a report on the results of the worldwide review, submit a list of countries that do not provide requested information to the President, and recommend other lawful restrictions or limitations deemed necessary for the security of the United States. 82 Fed. Reg. at 13212–13. Likewise, during the interim period when refugee

admissions is suspended, Section 6 directs the Secretary of State, in conjunction with the Secretary of Homeland Security and the Director of National Intelligence, to conduct an internal review and implement additional procedures identified by the review. *Id.* at 13215. Section 6 also requires the Secretary of State to review the "existing law" to determine how State and local jurisdictions could have greater involvement in the process of determining refugee placement. *Id.* at 13216.

Although other unenjoined sections of EO2 permit interagency coordination to review vetting procedures, the district court nonetheless abused its discretion in enjoining the inward-facing tasks of Sections 2 and 6. Enjoining the entirety of Sections 2 and 6 was not narrowly tailored to addressing only the harms alleged. For example, internal determinations regarding the necessary information for visa application adjudications do not have an obvious relationship to the constitutional rights at stake or statutory conflicts at issue here. Plaintiffs have not shown how the Government's internal review of its vetting procedures will harm them. We vacate the preliminary injunction to the extent it enjoins internal review procedures that do not burden individuals outside of the executive branch of the federal government. *See Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) ("An injunction against a government agency must be structured to take into account 'the well-established rule that the government has traditionally been granted the widest latitude in the "dispatch of its own internal affairs."'" (quoting *Rizzo v.*

Goode, 423 U.S. 362, 378–79 (1976))); *cf. Bowen v. Roy*, 476 U.S. 693, 700 (1986) (explaining that the Free Exercise Clause "affords an individual protection from certain forms of governmental compulsion [but] does not afford an individual a right to dictate the conduct of the Government's internal procedures").

B

The Government next argues that the district court erred in enjoining Section 6's refugee provisions, specifically the suspension of refugees and adoption of the 50,000 refugee cap.

The State alleges that Section 6 will force it to abandon the refugee program that embodies the State's traditions of openness and diversity. The State has several policies that aid and resettle refugees, and has a "long history of welcoming refugees impacted by war and oppression." As discussed earlier, OCS, a division of the Department of Labor and Industrial Relations, is directed to "[a]ssist and coordinate the efforts of all public and private agencies providing services which affect the disadvantaged, refugees, and immigrants." Haw. Rev. Stat. § 371K-4(5). OCS also operates the Refugee Social Services Program and the Refugee Cash and Medical Assistance Program. *See* Department of Labor and Industrial Relations, Office of Community Services, 2017 Hawaii State Plan for Refugee Assistance and Services (2016); https://labor.hawaii.gov/ocs/files/2013/02/FY17-State-Plan-for-Hawaii.pdf (last visited June 6, 2017). The State further highlights that aiding

refugees is central to the mission of private organizations, like Catholic Charities Hawai'i and Pacific Gateway Center.

Since fiscal year 2010, at least twenty refugees have arrived and resettled in Hawai'i, and in fiscal year 2017 to date, three have resettled there. While this is a small number of refugees, it does not diminish Hawai'i's interest in effectuating its refugee programs and investments. Enjoining the suspension and cap would protect the State's programs and efforts in resettling refugees.

Although the Government is correct in pointing out that most of Plaintiffs' alleged injuries center on the implementation of Section 2(c), at this preliminary stage of litigation, the district court did not abuse its discretion by enjoining Section 6's operative provisions suspending refugee admission on the basis of the current record. We therefore reject the Government's challenge on this point.

C

The Government next contends that the district court erred by enjoining Section 2(c) as to all persons everywhere, rather than redressing only Plaintiffs' injuries. The Government requests that the nationwide injunction be limited to Plaintiffs only.[24]

[24] The Government also argues that to the extent § 1152(a)(1)(A) cabins executive authority, the injunction entered by the district court can only apply to immigrant visas and should not apply to *nonimmigrant* visas. We decline to narrow the injunction on the grounds proposed by the Government because, even assuming

The district court identified two reasons to support a nationwide injunction. First, the district court emphasized that in certain circumstances, it is appropriate for courts to issue nationwide injunctions. *Hawai'i PI*, 2017 WL 1167383, at *8. As the Fifth Circuit observed in *Texas v. United States*, nationwide injunctions are particularly appropriate in the immigration context because "immigration laws of the United States should be enforced vigorously and *uniformly*." 809 F.3d at 187–88; *see* U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an *uniform* Rule of Naturalization . . . .") (emphasis added). Enjoining the conduct as to Plaintiffs may result in "fragmented immigration policy [that] would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." *Washington*, 847 F.3d at 1166–67 (citing to *Texas*, 809 F.3d at 187–88)).

Second, the district court made clear that the Government did not provide a workable framework for narrowing the geographic scope of the injunction. *See id.* at 1167 ("[E]ven if limiting the geographic scope of the injunction would be desirable, the Government has not proposed a workable alternative form of the TRO that accounts for the nation's multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue

the Government is correct, the President failed to meet the precondition to exercising his authority under § 1182(f).

here while nevertheless applying only within the States' borders."). On appeal, the Government has not offered any new workable method of limiting the geographic scope of the injunction.

An "injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled.*" *Bresgal*, 843 F.2d at 1170–71. Narrowing the injunction to apply only to Plaintiffs would not cure the statutory violations identified, which in all applications would violate provisions of the INA. *See Int'l Refugee Assistance Project*, 2017 WL 2273306, at *27 (affirming the nationwide injunction because Section 2(c) of EO2 likely violates the Establishment Clause, and its constitutional deficiency "would endure" in all applications); *cf. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989))).

The district court did not abuse its discretion in entering a nationwide preliminary injunction.

D

Finally, the Government argues that the district court erred by issuing an injunction that runs against the President himself. This position of the Government is well taken. Generally, we lack "jurisdiction of a bill to enjoin the President in the performance of his official duties." *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (quoting *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866)); *see id.* at 802 ("[I]njunctive relief against the President himself is extraordinary, and should . . . raise[] judicial eyebrows."). Injunctive relief, however, may run against executive officials, including the Secretary of Homeland Security and the Secretary of State. *See, e.g.*, *Youngstown Sheet & Tube Co.*, 343 U.S. at 588–89 (holding that President Truman did not act within his constitutional power in seizing steel mills and affirming the district court's decision enjoining the Secretary of Commerce from carrying out the order); *Franklin*, 505 U.S. at 802–03.

We conclude that Plaintiffs' injuries can be redressed fully by injunctive relief against the remaining Defendants, and that the extraordinary remedy of enjoining the President is not appropriate here. *See Franklin*, 505 U.S. at 803. We therefore vacate the district court's injunction to the extent the order runs against the President, but affirm to the extent that it runs against the remaining "Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them."

E

The district court did err in enjoining the entirety of Sections 2 and 6, particularly the portions that pertain to interagency review, despite the Government's requests for clarification and requests to narrow the injunction to enjoin conduct that actually harms Plaintiffs. The district court abused its discretion in enjoining inward-facing agency conduct because enjoining this conduct would not remedy the harms asserted by Plaintiffs. Further, the district court abused its discretion in enjoining the President. We would not be able to affirm in full the preliminary injunction even if Plaintiffs were also likely to succeed on their constitutional claims, for reasons that enjoining internal review procedures does not remedy harms to Plaintiffs and because it is improper to enjoin the President without necessity. As we have affirmed the injunction in part on statutory grounds, and vacated certain parts on the basis of considerations governing the proper scope of an injunction, we need not consider the constitutional claims here.

VI

We affirm in part and vacate in part the district court's preliminary injunction order. As to the remaining Defendants, we affirm the injunction as to Section 2(c), suspending entry of nationals from the six designated countries for 90 days; Section 6(a), suspending USRAP for 120 days; and Section 6(b), capping the

entry of refugees to 50,000 in the fiscal year 2017. We vacate the portions of the injunction that prevent the Government from conducting internal reviews, as otherwise directed in Sections 2 and 6, and the injunction to the extent that it runs against the President. We remand the case to the district court with instructions to re-issue a preliminary injunction consistent with this opinion.[25]

AFFIRMED in part; VACATED in part; and REMANDED with instructions. Each party shall bear its own costs on appeal.

[25] The Government's motion for a stay pending appeal is **DENIED** as moot.

COUNSEL

Jeffrey Bryan Wall (argued), Acting Solicitor General; Edwin S. Kneedler, Deputy Solicitor General; Sharon Swingle, Anne Murphy, Lowell V. Sturgill Jr., H. Thomas Byron III, and Douglas N. Letter, Attorneys, Appellate Staff; August E. Flentje, Special Counsel to the Assistant Attorney General; Elliot Enoki, Acting United States Attorney; Chad A. Readler, Acting Assistant Attorney General; Civil Division, United States Department of Justice, Washington, D.C.; for Defendants-Appellants.

Neal Kumar Katyal (argued), Colleen Roh Sinzdak, Mitchell P. Reich, and Elizabeth Hagerty, Hogan Lovells US LLP, Washington, D.C.; Thomas P. Schmidt, Hogan Lovells US LLP, New York, New York; Sara Solow and Alexander B. Bowerman, Hogan Lovells US LLP, Philadelphia, PA; Douglas S. Chin, Attorney General; Clyde J. Wadsworth, Solicitor General; Deirdre Marie-Iha, Donna H. Kalama, Kimberly T. Guidry, and Robert T. Nakatsuji, Deputy Attorneys General; Department of the Attorney General, Honolulu, Hawai'i; for Plaintiffs-Appellees.

Scott A. Keller, Solicitor General; J. Campbell Barker, Deputy Solicitor General; Ari Cuenin, Assistant Solicitor General; Ken Paxton, Attorney General; Jeffrey C. Mateer, First Assistant Attorney General; Office of the Attorney General, Austin, Texas; for Amici Curiae States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia, and Governor Phil Bryant of the State of Mississippi.

Amir H. Ali, Roderick & Solange MacArthur Justice Center, Washington, D.C.; Jessica M. Wan, Lisa W. Cataldo, and David J. Minkin, McCorriston Miller Mukai MacKinnon LLP, Honolulu, Hawai'i; for Amicus Curiae The Roderick and Solange MacArthur Justice Center.

Robert D. Fram and Alexandra P. Grayner, Covington & Burling LLP, San Francisco, California; Andrew Guy, Michael Baker, Karun Tilak, and Ligia M. Markman, Covington & Burling LLP, Washington, D.C.; for Amici Curiae Interfaith Coalition.

Kevin P. Martin, Eileen L. Morrison, Alicia Rubio, Joshua M. Daniels, William B. Brady, and Nicholas K. Mitrokostas, Goodwin Procter LLP, Boston, Massachusetts, for Amici Curiae The Foundation for the Children of Iran and

Iranian Alliances Across Borders.

Michael R. Scott, Lisa J. Chaiet Rahman, and Amit D. Ranade, Hillis Clark Martin & Peterson P.S., Seattle, Washington, for Amici Curiae Episcopal Bishops.

Dan Jackson, R. Adam Lauridsen, and John W. Keker, Keker, Van Nest & Peters LLP, San Francisco, California, for Amicus Curiae Khizr Khan.

Lary A. Rappaport, Proskauer Rose LLP, Los Angeles, California; Terrance Nolan, General Counsel and Secretary, New York University, New York, New York; Claire Wong Black and J. Blaine Rogers, Alston Hunt Floyd & Ing, Honolulu, Hawai'i; Tiffany M. Woo, Seth D. Fiur, and Steven E. Obus, Proskaur Rose LLP, New York, New York; for Amicus Curiae New York University.

Aaron X. Fellmeth, Sandra Day O'Connor College of Law, Arizona State University, Phoenix, Arizona; Jonathan Hafetz, Seton Hall University School of Law, Newark, New Jersey; Joseph M. McMillan and Michelle L. Maley, Perkins Coie LLP, Seattle, Washington; for Amici Curiae International Law Scholars and Nongovernmental Organizations.

Lindsay C. Harrison, Tassity S. Johnson, Erica L. Ross, and Thomas J. Perrelli, Jenner & Block LLP, Washington, D.C., for Amici Curiae Colleges and Universities.

Mary Kelly Persyn, Persyn Law & Policy, San Francisco, California, for Amicus Curiae American Professional Society on the Abuse of Children.

Jonathan M. Freiman and Tahlia Townsend, Wiggin and Dana LLP, New Haven, Connecticut; Harold Hongju Koh and Hope Metcalf, Rule of Law Clinic, Yale Law School, New Haven, Connecticut; for Amici Curiae Former National Security Officials.

Anna-Rose Mathieson and Ben Feuer, California Appellate Law Group LLP, San Francisco, California, for Amici Curiae Scholars of American Religious History & Law.

Richard D. Bernstein, Willkie Farr & Gallagher LLP, Washington, D.C., for Amicus Curiae T.A., a U.S. Citizen of Yemeni Descent.

Joshua Matz, Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP,

Washington, D.C., for Amici Curiae Constitutional Law Scholars.

Marc A. Hearron, Morrison & Foerster LLP, Washington, D.C.; Purvi G. Patel, Morrison & Foerster LLP, Los Angeles, California; Amanda Aikman and Jennifer K. Brown, Morrison & Foerster LLP, New York, New York; Sandeep N. Nandivada, Morrison & Foerster LLP, McLean, Virginia; for Amici Curiae Interfaith Group of Religious and Interreligious Organizations.

Anton A. Ware, Arnold & Porter Kaye Scholer LLP, San Francisco, California; Aziz Huq, Johnathan J. Smith, and Farhana Khera, Muslim Advocates, Oakland, California; for Amici Curiae Muslim Rights, Professional and Public Health Organizations.

David L. Franklin, Solicitor General, and Lisa Madigan, Attorney General, Office of the Illinois Attorney General, Chicago, Illinois; for Amici Curiae States of Illinois, California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia.

William S. Consovoy, Consovoy McCarthy Park PLLC, Arlington, Virginia; Kimberly S. Hermann, Southeastern Legal Foundation, Marietta, Georgia; for Amicus Curiae Southeastern Legal Foundation, Inc.

Edward L. White III and Erik M. Zimmerman, American Center for Law and Justice, Ann Arbor, Michigan; Geoffrey R. Surtees and Francis J. Manion, American Center for Law and Justice, New Hope, Kentucky; Benjamin P. Sisney, Matthew R. Clark, Craig L. Parshall, Jordan Sekulow, Andrew J. Ekonomou, Colby M. May, Stuart J. Roth, and Jay Alan Sekulow, American Center for Law and Justice, Washington, D.C.; for Amicus Curiae American Center for Law and Justice.

Pratik A. Shah and Martine E. Cicconi, Akin Gump Strauss Hauer & Feld LLP, Washington, D.C.; Robert S. Chang, Fred T. Korematsu Center for Law and Equality, Seattle, Washington; Eric Yamamoto, Fred T. Korematsu Professor of Law and Social Justice, Honolulu, Hawai'i; Claire Wong Black and Louise K.Y. Ing; Alston Hunt Floyd & Ing, Honolulu, Hawai'i; Alice Hsu and Robert A. Johnson, Akin Gump Strauss Hauer & Feld LLP, New York, New York; Jessica M. Weisel, Akin Gump Strauss Hauer & Feld LLP, Los Angeles, California; for Amici Curiae Fred T. Korematsu Center for Law and Equality, Jay Hirabayashi, Holly Yasui, Karen Korematsu, Civil Rights Organizations, and National Bar

Associations of Color.

Richard B. Katskee, Carmen Green, Bradley Girard, Kelly M. Percival, Andrew L. Nellis, and Eric Rothschild, Americans United for Separation of Church and State, Washington, D.C.; Gillian Gillers and Kristi L. Graunke, Southern Poverty Law Center, Atlanta, Georgia; for Amici Curiae Members of the Clergy, Americans United for Separation of Church and State, Bend the Arc: A Jewish Partnership for Justice, The Riverside Church in the City of New York, and The Southern Poverty Law Center.

Benna Ruth Solomon, Deputy Corporation Counsel; Edward N. Siskel, Corporation Counsel; City of Chicago Department of Law, Chicago, Illinois; Eliberty Lopez, Brian Neff, and Ryan P. Poscablo, Riley Safer Holmes & Cancila LLP, New York, New York; Nick Kahlon, Riley Safer Holmes & Cancila LLP, Chicago, Illinois; for Amici Curiae Cities of Chicago, Los Angeles, New York, Philadelphia, and Other Major Cities and Counties.

Linda A. Klein, President, American Bar Association, Chicago, Illinois; Jared S. Stein, Arianna Markel, Erin J. Morgan, Aidan Synnott, and Sidney S. Rosdeitcher, New York, New York; for Amicus Curiae American Bar Association.

Jonathan A. Scruggs and Kevin H. Theriot, Alliance Defending Freedom, Scottsdale, Arizona, as and for Amicus Curiae Alliance Defending Freedom.

Richard P. Bress, Alexandra P. Schechtel, and Elana Nightingale Dawson, Latham & Watkins LLP, Washington, D.C.; Christopher Mortweet, Latham & Watkins LLP, Menlo Park, California; for Amicus Curiae Oxfam America, Inc.

Christopher J. Hajec, Mark S. Venezia, and Elizabeth A. Hohenstein, Immigration Reform Law Institute, Washington, D.C., as and for Amicus Curiae Immigration Reform Law Institute.

G. Eric Brunstad, Jr., Dechert LLP, Hartford, Connecticut, for Amici Curiae HIAS, The IRC, and USCRI.

Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, Washington; Leo Gertner, Deborah L. Smith, Claire Prestel, and Nicole G. Berner, Service Employees International Union, for Amicus Curiae Service Employees International Union; Judith Rivlin, Washington, D.C., as and for Amicus Curiae American Federation of State, County, and Municipal Employees; Channing M.

Cooper and David J. Strom, Washington, D.C., as and for Amicus Curiae American Federation of Teachers.

Peter Jaffe, Brent Wible, Lauren Kaplin, and Daniel Braun, Freshfields Bruckhaus Deringer US LLP, Washington, D.C.; Karen Wiswall and David Y. Livshiz, Freshfields Bruckhaus Deringer US LLP, New York, New York; for Amicus Curiae Cato Institute.

Kenneth A. Klukowski, Alexandria, Virginia, as and for Amicus Curiae American Civil Rights Union.

Elizabeth B. Wydra, David H. Gans, and Brianne J. Gorod, Constitutional Accountability Center, Washington, D.C.; Peter Karanjia and Jason Harrow, Davis Wright Tremaine LLP, Washington, D.C.; Raymond H. Brescia, Associate Professor of Law, Albany Law School, Albany, New York; Victor A. Kovner, Davis Wright Tremaine LLP, New York, New York; for Amici Curiae 165 Members of Congress.

Michael J. Gottlieb, Aaron E. Nathan, Cain Norris, J. Wells Harrell, Isra Bhatty, and Joshua Riley, Boies Schiller Flexner LLP, Washington, D.C.; Eli Glasser, Boies Schiller Flexner LLP, Fort Lauderdale, Florida; for Amici Curiae Former Federal Immigration and Homeland Security Officials.

Andrew J. Pincus and Paul W. Hughes, Mayer Brown LLP, Washington, D.C., for Amici Curiae Technology Companies.

Nathaniel C. Love and Robert N. Hochman, Sidley Austin LLP, Chicago, Illinois; Charles Roth, National Immigrant Justice Center, Chicago, Illinois; for Amicus Curiae National Immigrant Justice Center; Gail Pendelton, Suffield, Connecticut, as and for Amicus Curiae ASISTA; Jennie Santos-Bourne, Miami, Florida, as and for Amicus Curiae Americans for Immigrant Justice; Linda A. Seabrook, General Counsel, San Francisco, California, as and for Amicus Curiae Futures Without Violence; Jean Bruggeman, Arlington, Virginia, as and for Amicus Curiae Freedom Network USA; Amily K. McCool, Durham, North Carolina, as and for Amicus Curiae North Carolina Coalition Against Domestic Violence.

Victor Williams, Bethesda, Maryland, pro se for Amicus Curiae America First Lawyers Association.

Scott L. Winkelman, Justin Kingsolver, Avi Rutschman, and Luke van

Houwelingen, Crowell & Moring LLP, Washington, D.C., for Amici Curiae Tahirih Justice Center, The Asian Pacific Institute on Gender-Based Violence, Casa de Esperanza, and National Domestic Violence Hotline.

James W. Kim, McDermott Will & Emery LLP, Washington, D.C.; Albert Giang, Rachana Pathak, Meredith S.H. Higashi, Navdeep Singh, and Tina R. Matsuoka, National Asian Pacific American Bar Association, Washington, D.C.; for Amicus Curiae National Asian Pacific American Bar Association.

Brett R. Tobin, Goodsill Anderson Quinn & Stifel LLP, Honolulu, Hawai'i; Daniel L. McFadden, Christopher E. Hart, Kristyn DeFilipp, and Michael B. Keating, Foley Hoag LLP, Boston, Massachusetts, for Amicus Curiae Massachusetts Technology Leadership Council, Inc.

Avi Gesser, Ilan Stein, Jennifer Prevete, Alex Messiter, Joseph Garmon, and Kelsey Clark, Davis Polk & Wardwell LLP, New York, New York, for Amici Curiae Association of Art Museum Directors, American Alliance of Museums, Association of Academic Museums and Galleries, College Art Association, and 101 Art Museums.

Herbert W. Titus, Jeremiah L. Morgan, William J. Olson, and Robert J. Olson, William J. Olson P.C., Vienna, Virginia; Michael Boos, Citizens United, Washington, D.C.; Joseph W. Miller, U.S. Justice Foundation, Ramona, California; for Amici Curiae U.S. Justice Foundation, Citizens United, Citizens United Foundation, English First Foundation, English First, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, U.S. Border Control Foundation, and Policy Analysis Center.

Benjamin G. Shatz, Ketakee Kane, Olufunmilayo Showole, Matthew Bottomly, Sirena Castillo, John W. McGuinness, and Amy Briggs, Manatt Phelps & Phillips LLP, Los Angeles, California, for Amici Curiae Muslim Justice League, Islamic Circle of North America, and Council of American-Islamic Relations, California.

Claire Loebs Davis, Taylor Washburn, and Jessica N. Walder, Lane Powell PC, Seattle, Washington, for Amici Curiae Law Professors.

Lena F. Masri, National Litigation Director, Council on American-Islamic Relations, Washington, D.C.; Gadeir I. Abbas, Law Office of Gadeir Abbas, Washington, D.C.; for Amici Curiae Muslim Civil Rights Activists Linda Sarsour,

Rashida Tlaib, Zahra Billoo, Basim Elkarra, Hussam Ayloush, Alia Salem, Adam Soltani, Imraan Siddiqi, Namira Islam, Karen Dabdoub, Jim Sues, Hanif Mohebi, and Jaylani Hussein.

Ester Sung, Melissa S. Keaney, Nicholas Espíritu, and Karen C. Tumlin, National Immigration Law Center, Los Angeles, California; Justin B. Cox, National Immigration Law Center, Atlanta, Georgia; Mark Doss, Lara Finkbeiner, Stephen Poellot, and Rebecca Heller, International Refugee Assistance Project at the Urban Justice Center, New York, New York; for Amici Curiae National Immigration Law Center and International Refugee Assistance Project.

Nicole Y. Altman, Goodsill Anderson Quinn & Stifel LLP, Honolulu, Hawai'i; Lilly Landsman-Roos and John B. Harris, Frankfurt Kurnit Klein & Selz PC, New York, New York; Michael Lieberman, Melissa Garlick, Lauren A. Jones, and Steven M. Freeman, Anti-Defamation League, New York, New York; Doron F. Ezickson, Anti-Defamation League, Washington, D.C.; Alyssa T. Saunders and David E. Mills, Cooley LLP, Washington, D.C.; David Bohm, Danna McKintrick P.C., St. Louis, Missouri; for Amici Curiae Anti-Defamation League, Jewish Council for Public Affairs, Union for Reform Judaism, Central Conference of American Rabbis, and Women of Reform Judaism.

Alan C. Turner, Simpson Thacher & Bartlett LLP, New York, New York; Jonathan Mincer and Harrison Frahn, Simpson Thacher & Bartlett LLP, Palo Alto, California; for Amici Curiae Human Rights First, Kids in Need of Defense (KIND), City Bar Justice Center, Community Legal Services in East Palo Alto, Catholic Migration Services, the Door's Legal Services Center, Safe Passage Project, and Sanctuary for Families.

Matthew E. Sloan, Alyssa J. Clover, Richard A. Schwartz, and Allison B. Holcombe, Skadden, Arps, Slate, Meagher & Flom LLP, Los Angeles, California; Jennifer H. Berman and Eric J. Gorman, Skadden, Arps, Slate, Meagher & Flom LLP, Chicago, Illinois; Jonathan Fombonne, Sarah Grossnickle, and Noelle M. Reed, Skadden, Arps, Slate, Meagher & Flom LLP, Houston, Texas; Joseph M. Sandman, Skadden, Arps, Slate, Meagher & Flom LLP, Washington, D.C.; Aaron Morris, Immigration Equality, New York, New York; Virginia M. Goggin, New York City Gay and Lesbian Anti-Violence Project, New York, New York; Glenn Magpantay, The National Queer Asian Pacific Islander Alliance, New York, New York; for Amici Curiae Immigration Equality, New York City Gay and Lesbian Anti-Violence Project, and National Queer Asian Pacific Islander Alliance.

Lynn Lincoln Sarko, Alison S. Gaffney, Derek W. Loeser, Amy Williams-Derry, and Tana Lin, Keller Rohrback L.L.P., Seattle, Washington; La Rond Baker and Emily Chiang, American Civil Liberties Union of Washington Foundation, Seattle, Washington; Laurie B. Ashton, Keller Rohrback L.L.P., Phoenix, Arizona; Alison Chase, Keller Rohrback L.L.P., Santa Barbara, California; for Amici Curiae Joseph Doe, James Doe, and the Episcopal Diocese of Olympia.

Patricia S. Rose, Seattle, Washington, for Amici Curiae One Million Kids for Equality and African Human Rights Coalition.

Supreme Court, U.S.
FILED
JUN 20 2017
OFFICE OF THE CLERK

No. 16A-1191

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Applicants,

v.

STATE OF HAWAII, *et al.*,
Respondents.

SUPPLEMENTAL BRIEF OPPOSING THE GOVERNMENT'S APPLICATION FOR A STAY AND PETITION FOR CERTIORARI

DOUGLAS S. CHIN
Attorney General of the State of Hawaii
CLYDE J. WADSWORTH
Solicitor General of the State of Hawaii
DEIRDRE MARIE-IHA
DONNA H. KALAMA
KIMBERLY T. GUIDRY
ROBERT T. NAKATSUJI
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL,
STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

Counsel for the State of Hawaii

NEAL KUMAR KATYAL*
COLLEEN ROH SINZDAK
MITCHELL P. REICH
ELIZABETH HAGERTY
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com
**Counsel of Record*

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

SARA SOLOW
ALEXANDER B. BOWERMAN
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103

Counsel for Respondents

June 20, 2017

RECEIVED
JUN 21 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT 4

ARGUMENT 6

I. THE DECISION BELOW IS CORRECT 8

A. The Order Is Reviewable 8

1. The Court Has A Constitutional Duty To Ensure The Executive Order Complies With The Dictates of Congress And The Constitution 8

2. The Plaintiffs Have Standing To Challenge The Order On Both Statutory And Constitutional Grounds 10

B. The Order Exceeds The President's Statutory Authority 16

1. The President's Authority Under Section 1182(f) Is Subject To Statutory Limits 17

2. The Order Is Irreconcilable With The Statute 20

C. The Order Is Unconstitutional 28

II. THIS COURT SHOULD NOT STAY THE INJUNCTION 31

A. The Equities Favor Maintaining The Injunction 31

B. The Scope Of The Injunction Is Proper 32

III. CERTIORARI IS NOT WARRANTED 35

CONCLUSION 40

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES:

Abourezk v. *Reagan*,
785 F.2d 1043 (D.C. Cir. 1986) 20

Allende v. *Shultz*,
845 F.2d 1111 (1st Cir. 1988) 20

Arizona v. *United States*,
567 U.S. 387 (2012) 14, 17

Bank of Am. Corp. v. *City of Miami*,
137 S. Ct. 1296 (2017) 14

Bowen v. *Am. Hosp. Ass'n*,
476 U.S. 610 (1986) 26

Commodity Futures Trading Comm'n v. *British Am. Commodity Options Corp.*, 434 U.S. 1316 (1977) (Marshall, J., in chambers) 32

Dakota Cent. Tel. Co. v. *South Dakota*,
250 U.S. 163 (1919) 10

Dalton v. *Specter*,
511 U.S. 462 (1994) 10

Dames & Moore v. *Regan*,
452 U.S. 932 (1981) 39

Dames & Moore v. *Regan*,
453 U.S. 654 (1981) ..... *passim*

Dayton Bd. of Educ. v. *Brinkman*,
439 U.S. 1358 (1978) (Rehnquist, J., in chambers) 32

Dole v. *United Steelworkers of Am.*,
494 U.S. 26 (1990) 33

Fiallo v. *Bell*, 430 U.S. 787 (1977) 28

Franklin v. *Massachusetts*,
505 U.S. 788 (1992) 10

Galvan v. *Press*,
347 U.S. 522 (1954) 17

Gonzales v. *Oregon*,
546 U.S. 243 (2006) 18, 33

Hamdi v. *Rumsfeld*,
542 U.S. 507 (2004) 9

Holder v. *Humanitarian Law Project*,
561 U.S. 1 (2010) 8

Honig v. *Students of Cal. Sch. for the Blind*,
471 U.S. 148 (1985) 35

INS v. *Cardoza-Fonseca*,
480 U.S. 421 (1987) 33

INS v. *Chadha*,
462 U.S. 919 (1983) 28, 29

Int'l Refugee Assistance Project v. *Trump*,
857 F.3d 554 (4th Cir. May 25, 2017) 23

Judulang v. *Holder*,
565 U.S. 42 (2011) 21

Kent v. *Dulles*,
357 U.S. 116 (1958) 19, 20

Kerry v. *Din*,
135 S. Ct. 2128 (2015) 29

Kleindienst v. *Mandel*,
408 U.S. 753 (1972) 2, 28, 29, 30

LeBlanc-Sternberg v. *Fletcher*,
67 F.3d 412 (2d Cir. 1995) 30, 31

Legal Assistance for Vietnamese Asylum Seekers v. *Dep't of State*,
45 F.3d 469 (D.C. Cir. 1995) 12, 27

Locke v. *Davey*,
540 U.S. 712 (2004) 31

Lujan v. *Defs. of Wildlife*,
504 U.S. 555 (1992) 13

Mach Mining, LLC v. *EEOC*,
135 S. Ct. 1645 (2015) 25

Marbury v. *Madison*,
5 U.S. (1 Cranch) 137 (1803) 4, 8

Mathews v. *Diaz*,
426 U.S. 67 (1976) 17

McGowan v. *Maryland*,
366 U.S. 420 (1961) 15

Nat'l League of Cities v. *Brennan*,
419 U.S. 1321 (1974) (Burger, C.J., in chambers) 34

Pittston Coal Grp. v. *Sebben*,
488 U.S. 105 (1988) 33

Reno v. *Am. Civil Liberties Union*,
521 U.S. 844 (1997) 34

Rice v. *Sioux City Mem'l Park Cemetery, Inc.*,
349 U.S. 70 (1955) 36

Rostker v. *Goldberg*,
453 U.S. 57 (1981) 9

Ruckelshaus v. *Monsanto Co.*,
463 U.S. 1315 (1983) (Blackmun, J., in chambers) 32

Salazar v. *Buono*,
559 U.S. 700 (2010) 28

Sale v. *Haitian Ctrs. Council, Inc.*,
509 U.S. 155 (1993) 9, 19, 21

Santa Fe Indep. Sch. Dist. v. *Doe*,
530 U.S. 290 (2000) 33

Sessions v. *Morales-Santana*,
No. 15-1191 (U.S. June 12, 2017) 29

Thornburgh v. *Am. Coll. of Obstetricians & Gynecologists*,
476 U.S. 747 (1986) 34

United States v. *Fausto*,
484 U.S. 439 (1988) 27

United States v. *Nixon*,
418 U.S. 683 (1974) 39

United States v. *Robel*,
389 U.S. 258 (1967) 9, 10

United States v. *United Mine Workers of Am.*,
330 U.S. 258 (1947) 39

United States v. *U.S. Dist. Court for E. Dist. of Mich.*,
407 U.S. 297 (1972) 9

United States v. *Varca*,
896 F.2d 900 (5th Cir. 1990) 35

United States v. *Witkovich*,
353 U.S. 194 (1957) 20

U.S. ex rel. Knauff v. *Shaughnessy*,
338 U.S. 537 (1950) 17

Virginia Military Inst. v. *United States*,
508 U.S. 946 (1993) 36

Washington v. *Trump*,
No. 17-35105 (9th Cir. 2017) 16, 38

Webster v. *Doe*,
486 U.S. 592 (1988) 10

Winter v. *Nat. Res. Def. Council, Inc.*,
555 U.S. 7 (2008) 33

Wong Wing Hang v. *INS*,
360 F.2d 715 (2d Cir. 1966) 21

Youngstown Sheet & Tube Co. v. *Sawyer*,
343 U.S. 579 (1952) 2

Zemel v. *Rusk*,
381 U.S. 1 (1965) 19, 20

Ziglar v. *Abbasi*,
No. 15-1358, Slip Op. (June 19, 2017) 2

Zivotofsky ex rel. Zivotofsky v. *Clinton*,
566 U.S. 189 (2012) 8

STATUTES:

8 U.S.C. § 1101(a)(15) 14

8 U.S.C. § 1152(a)(1)(A) 19, 26

8 U.S.C. § 1157 27

8 U.S.C. § 1182(a)(3)(B) 20, 21

8 U.S.C. § 1182(a)(4) 24

8 U.S.C. § 1182(f) ..... *passim*

8 U.S.C. § 1187(a)(12) 18, 21

8 U.S.C. § 1361 24

50 U.S.C. § 21 27

Haw. Administrative Code § 17-661-6 to -21 14

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. I, § 8 ..... 3, 17, 28

U.S. Const. art. II, § 2 3

REGULATIONS AND EXECUTIVE MATERIALS:

8 C.F.R. § 214(f) 14

45 C.F.R. § 400.4 *et seq.* 14, 15

Exec. Order 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) ..... *passim*

Exec. Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) 23

Presidential Memorandum, Effective Date in Executive Order 13,780, 82 Fed. Reg. 27965 (June 14, 2017) ..... *passim*

Proclamation No. 5517, 51 Fed. Reg. 30470 (Aug. 22, 1986) 22

OTHER AUTHORITIES:

Alan Haynes, *The Gunpowder Plot* (2011) 3

Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:25 AM), https://twitter.com/realdonaldtrump/status/871674214356484096 11-12

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003) 3

Sopan Deb, *Trump Continues To Question Obama's Commitment to Fighting Terror*, CBS News (June 14, 2016), https://goo.gl/TzQ5aj 16

Robert L. Stern *et al.*, *Supreme Court Practice* (8th ed. 2002) 35

Tal Kopan, *First on CNN: 9th Circuit Travel Ban Ruling 'Big Win' for Administration, Kelly Says*, CNN (June 15, 2017), https://goo.gl/2t9Vw4 6

INTRODUCTION

Two Courts of Appeals are now united in enjoining Executive Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) (the "Order")—a policy that flouts the limits of Executive power, denigrates Muslim-Americans, and threatens the Nation's reputation as a place of refuge for immigrants and refugees alike. In those courts, the Government grounded its (unsuccessful) defense of the Order on one key rationale: The travel and refugee bans are allegedly necessary stopgap measures while the Administration conducts a review and upgrade of existing vetting procedures. Both courts saw that rationale for the sham that it was, one that can neither mask the Order's denigration of Muslims nor justify ignoring the immigration laws' finely reticulated limits.

Two days after the Ninth Circuit's decision, the President removed any doubt that the courts were correct. On June 14, he issued a memorandum instructing agencies to begin the 90- and 120-day vetting review within days, but to put the Order's bans into effect whenever the remaining injunctions are lifted. This memorandum conclusively severs the already tenuous relationship between the bans and their ostensible rationale by making clear that the Order's travel and refugee restrictions may begin even *after* the vetting reviews are completed. Indeed, the President himself has claimed that the Government is already engaged in the "EXTREME VETTING" the Order was purportedly designed to facilitate.

The President's memorandum also empties the present petition for certiorari of any compelling justification. The Government does not explain why this Court's

review would be warranted once the supposed purpose of the Order—the completion of the vetting upgrade—has lapsed, as it almost surely will have by the time this case is heard in October.

Instead, the Government doubles down on a breathtaking vision of unreviewable Executive power. It asserts that the Ninth Circuit's detailed analysis of the ways in which the Order conflicts with the immigration laws is irrelevant because 8 U.S.C. § 1182(f) gives the President unfettered power to disregard Congress's immigration scheme at will. Further, the Government continues to claim that, under *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), courts may not even *begin* to evaluate the constitutionality of the Order.

The Government is wrong. As this Court has long explained, the Framers did not intend to endow the President with the sort of unreviewable "'prerogative exercised by George III.'" *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring); *see also Dames & Moore* v. *Regan*, 453 U.S. 654, 662 (1981) (quoting same). Thus, contrary to the President's assertions, Section 1182(f) could not—and assuredly does not—give him an absolute right to control immigration. And *Mandel* does not allow the President to wield a national security rationale like a "talisman used to ward off inconvenient claims—a label used to cover a multitude of sins." *Ziglar* v. *Abbasi*, No. 15-1358, Slip Op. at 20 (June 19, 2017) (internal quotation marks omitted).

The Government's argument to the contrary is predicated on an implicit threat: In these difficult times, when religiously-motivated terrorists attempt

unspeakable harms against our citizens and our government, any judicial interference in the national security determinations of the President puts our country at risk. Yet while these are no doubt difficult times, they are not unprecedented. At the time of the Founding, England was rife with violent religious plots—both real and imagined. *See, e.g.*, Alan Haynes, *The Gunpowder Plot* (2011). As a consequence, Catholics, Puritans, and other dissenters faced harsh treatment from their government, which viewed non-conformist religious beliefs as a threat to the state. *Id.* at 98-108; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2112–2114 (2003). Many of those who chafed under this persecution became the United States' first colonists, eager to avoid the excesses of the oppressive government they were fleeing. McConnell, *supra*, at 2115-2116.

Our Founders were thus familiar both with the violent threat posed by religious zealots and with the threat to our liberties posed by governments acting in the name of national security. Our Constitution is designed to guard against them both. It makes the President Commander-in-Chief, entrusted with the responsibility to protect the Nation. *See* U.S. Const. art. II § 2. But it also bars the establishment of religion, and gives Congress—a deliberative and diverse body—the governmental powers that are most likely to be used in the service of religious discrimination. One of those powers is control over immigration. U.S. Const. art. I § 8; *see* McConnell, *supra*, at 2116-2117.

In this case, courts have done nothing more than fulfill their "emphatic[] * * * duty" to preserve the balance our Framers struck. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). They have prevented the President from overriding the will of Congress and arbitrarily wielding the immigration power, and they have enforced the fundamental dictates of the First Amendment. There is no need for this Court to intervene, particularly in this interlocutory posture. The Courts of Appeals have correctly found the Order grossly unlawful. And the Government has revealed by word and deed that even it no longer believes there is any need for the policy currently enjoined. The Nation's fundamental laws and liberties have been protected and this dispute has run its course. Both the petition for certiorari and the stay request should be denied.

STATEMENT

Hours after respondents filed their opposition to the Government's stay application, the Ninth Circuit issued a unanimous per curiam opinion confirming the invalidity of the travel and refugee bans contained in Executive Order 13,780. The Ninth Circuit held that it need not even reach the constitutionality of the Order because it exceeded the President' statutory authority in multiple ways.

The Court of Appeals explained that "immigration, even for the President, is not a one-person show." Suppl. Add. 2. Congress holds the immigration power, and Congress has not granted the President the power to disregard the express textual commands of the Immigration and Nationality Act ("INA"), or to undermine the immigration scheme Congress has so carefully crafted. Yet the Order does just

that, by failing to make the requisite findings before excluding millions of people and by flouting Congress's specific determinations with respect to nationality-based discrimination and the admission of refugees. Suppl. Add. 35-62.

As a result, the Ninth Circuit "affirm[ed] in large part the district court's order preliminarily enjoining Sections 2 and 6 of the Executive Order." Suppl. Add. 3. It narrowed the injunction in two ways, both of which are compatible with respondents' position before this Court. First, the Ninth Circuit concluded that the injunction must preclude Executive Branch officials from enforcing the President's travel and refugee bans, rather than running against the President himself. Suppl. Add. 76. Second, the court held that the President is free to review and upgrade the existing vetting procedures as stipulated in Sections 2 and 6, but is barred from implementing the travel and refugee bans or the refugee cap. Suppl. Add. 70-72.

Shortly after the Ninth Circuit issued its opinion, the President issued a memorandum purporting to clarify the "effective date" of the provisions in Sections 2 and 6. *See* Presidential Memorandum, Effective Date in Executive Order 13,780, 82 Fed. Reg. 27965 (June 14, 2017) (attached as Respondents' Supplemental Addendum). The memorandum explains that each separate provision will become effective 72 hours after any applicable injunction is lifted.

On June 19, 2017, the Ninth Circuit issued its mandate. C.A. Dkt. No. 318. The District Court issued a narrowed injunction on the same day, lifting the injunction on the "inward facing" provisions of the Order. D. Ct. Dkt. No. 291. As a consequence, the vetting and review provisions in Sections 2 and 6 will go into force

by the end of this week. By contrast, the travel and refugee bans and the refugee cap will not go into force unless and until the remaining injunctions are lifted.

ARGUMENT

In their initial opposition to the Government's stay application, respondents made clear that the Government cannot meet the requirements for obtaining the exceptional relief of a stay. Since then, the Government's position has weakened in three significant ways.

First, the Ninth Circuit has issued an opinion establishing that the President's Order plainly exceeds his statutory authority. The Order has now been held unlawful by a total of thirteen Circuit Judges and two District Judges, in opinions cataloguing the multiple and varied ways the Order runs afoul of our statutes and our Constitution. These decisions make it exceedingly unlikely that the Government will succeed on the merits of its case.

Second, the Ninth Circuit has made clear that the injunction does not interfere with any Executive Branch review of vetting procedures. Indeed, the Secretary of the Department of Homeland Security called the Ninth Circuit decision a "big win" for that reason,[1] even though respondents had taken pains to point out that the injunction never covered internal Executive Branch reviews in the first place. *See* Stay Opp. 35-38. A stay is obviously no longer warranted on that basis.

Finally, the President's June 14 memorandum divorces the travel and refugee bans from their asserted national security rationale. Because the

---

[1] Tal Kopan, *First on CNN: 9th Circuit Travel Ban Ruling 'Big Win' for Administration, Kelly Says*, CNN (June 15, 2017), https://goo.gl/2t9Vw4.

Presidential Memorandum declares that each provision of Sections 2 and 6 will go into force 72 hours after an applicable injunction is lifted, it is virtually assured that the travel and refugee bans will not run contemporaneously with the review and upgrade of vetting procedures.

That is baffling because the stated rationale for the bans, both in the text of the Order and throughout this litigation, assumes that the bans will run contemporaneously with the upgrade period. *See, e.g.*, Order § 2(c) (travel ban is necessary to lighten the strain on resources "during the review period"); *id.* § 6(a) (refugee ban will help the Administration "determine what additional procedures should be used" for vetting). Yet the President has now formally severed the imposition of the bans from the implementation of the vetting upgrade they were designed to facilitate. In doing so, he has further undercut the merits of the Government's claims and nullified the Government's assertions of irreparable harm.

In these circumstances, there is no basis for this Court to issue a stay of the injunction in whole or in part. Indeed, there is no need for the Court to grant review at all. The Government has not even requested that this Court hear the case until October. By that point, the Government will have had almost nine months to complete the review and upgrade of immigration procedures that the Order was allegedly designed to accomplish. Even when faced with important issues, this Court does not review cases that no longer have any practical urgency.[2] There is no

[2] The Government misses the point when it responds in its *IRAP* reply brief (at 2 n.1) with a cite to *United States* v. *Munsingwear*, 340 U.S. 36, 39-41 (1950). The

reason to depart from that rule here. If, however, the Court nevertheless decides to review the validity of the Order, respondents acquiesce in the Government's request to have this case heard in tandem with *International Refugee Assistance Project ("IRAP")* v. *Trump*. *See infra* p. 40.

I. THE DECISION BELOW IS CORRECT.

In order to obtain a stay or certiorari, the Government must first convince the Court that it has at least some likelihood of succeeding on the merits. It cannot.

A. The Order Is Reviewable.

1. The Court Has A Constitutional Duty To Ensure The Executive Order Is Lawful.

The Government's primary argument (at 7) is that the courts are powerless to hear this case because of the "general rule barring judicial review of the denial of entry to aliens abroad." This Court has resisted similar calls for the judiciary to abdicate its fundamental role in saying "what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177; *see Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (the fact that the President makes a foreign policy judgment does not compel "abdication of the judicial role"). Indeed, it has gone further, emphasizing that the judiciary has a constitutional obligation to fulfill that role, even when the issues are delicate, and even when they involve enforcing limits on the foreign policy powers of the other branches. *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 195-96 (2012).

---

point is not that this case will be formally moot, but only that this Court's review will not be needed because the alleged rationale for the bans will have been fulfilled.

Thus, while recognizing the tremendous difficulty a President faces in "exercising the executive authority in a world that presents each day some new challenge," this Court has reaffirmed its own duty to review whether an Executive Order implementing foreign policy is consistent with the President's statutory and constitutional powers. *Dames & Moore*, 453 U.S. at 662. It has not shrunk from that duty when the Executive Order in question involves the immigration power. *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-188 (1993). Nor has it evaded its constitutional obligation merely because the Executive claims a national security rationale. *United States* v. *Robel*, 389 U.S. 258, 263 (1967).

As the Ninth Circuit recognized below, courts may owe deference to "the President's immigration and national security policy judgments." Suppl. Add. 32. But "deference does not mean abdication." *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981). Particularly when constitutional or individual rights are at stake, courts must review the governmental policy at issue and determine whether its intrusion on liberties can be justified under the Constitution or the relevant statute. *See Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality op.) ("Whatever power the United States Constitution envisions for the Executive *** it most assuredly envisions a role for all three branches when individual liberties are at stake."); *United States* v. *U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 320 (1972) ("We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation."); *Robel*, 389 U.S. at 263 ("[T]he phrase

'war power' cannot be invoked as a talismanic incantation to support any exercise of * * * power which can be brought within its ambit.").

In fact, the few cases the Government claims discourage review in this case actually do the opposite. Take, for instance, *Dalton* v. *Specter*, 511 U.S. 462 (1994). That case says explicitly that, while some statutory provisions preclude review, courts *may* consider a statutory claim "concern[ing] 'a want of [Presidential] power,'" or a "constitutional claim[]." *Id.* at 474-75 (quoting *Dakota Cent. Tel. Co.* v. *South Dakota ex rel. Payne*, 250 U.S. 163, 184 (1919) (second alteration in original)); *see also Webster* v. *Doe*, 486 U.S. 592, 601-03 (1988) (rejecting APA challenge to Executive action but allowing constitutional challenge to same Executive action); *Franklin* v. *Massachusetts*, 505 U.S. 788, 801-04 (1992) (same). That is precisely what the courts below have done in enjoining the Order.

2. The Plaintiffs Have Standing To Challenge The Order On Both Statutory And Constitutional Grounds.

a. There is also no support for the Government's attack on respondents' standing. Dr. Elshikh certainly has standing to raise his statutory claims. His mother-in-law is seeking an immigrant visa from Syria. Stay Opp. 14. She interviewed at the consulate in May and her application is currently in administrative processing. *Id.* If the travel ban were to go into effect, her visa application would be denied and her admission to the United States delayed, if not denied outright.

There is no question that Dr. Elshikh's separation from his mother-in-law, and the effect that separation has on the rest of his family, qualify as injuries-in-

fact. The Government does not contest that; instead, it argues that "no such injury was imminent when the operative complaint was filed." Suppl. Br. 9. That is clearly wrong. At the time the Complaint was filed in March, Dr. Elshikh's mother-in-law had a visa application pending. If the travel ban had gone into effect as planned, her application would have been denied or tabled and she would not have been allowed into the country. Indeed, her visa interview was on May 24, fewer than 90-days after the original effective date of the travel ban, so the ban would (at the very least) have delayed her application. If there were there any doubt, during the brief period that the first Order was in effect, her application was *in fact* put on hold, and the hold was only lifted when the Order was enjoined. Suppl. Add. 19. The Order thus threatened imminent harm when the Complaint was filed, just as it threatens imminent harm now.

The Government also contends that Dr. Elshikh's claim is unripe, because his "mother-in-law may obtain a waiver." Suppl. Br. 9. Wrong again. The Government does not contest that the waiver process would impose additional delay; that alone makes the injury ripe. Stay Opp. 14. But even putting that aside, the Order states clearly that it "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States." Order § 16(c). The waiver provision is thus an illusory promise. As the President himself explained, "the lawyers * * * can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 3:25 AM), https://twitter.com/

realdonaldtrump/status/871674214356484096. The remote possibility of a waiver from the "BAN" does not undo Dr. Elshikh's present injury.[3]

The Government also argues that Dr. Elshikh "has no injury from Section 6's refugee provisions" because his mother-in-law is not seeking "refugee admission." Suppl. Br. 9. That simply ignores other concrete harms that Dr. Elshikh has shown. He is the Imam of a mosque in Hawaii that counts refugees as members. Stay Opp. 14-15. And the Order in its entirety stigmatizes Islam and therefore disfavors his faith, conferring Establishment Clause standing. C.A. E.R. 96; 131-32.

b. Hawaii also has standing to bring its statutory claim. The State's ability to recruit students and faculty to its University is constrained by the Order, and has been constrained since the moment the Order was announced. The University of Hawaii has 23 graduate students, multiple faculty members, and 29 visiting faculty from the six designated countries. C.A. E.R. 120-121. The University has made 14 offers of admission to graduate students located in the six countries targeted by the Order, and three of those students have accepted their offers of admission. Second Suppl. Decl. of Risa E. Dickson ¶¶ 3-5, C.A. Dkt. No. 307-2. Those students have to be on campus by August. The Order thus inflicts a clear harm on Hawaii.

---

[3] The Government does not contest—and has never contested—that Dr. Elshikh falls within the zone of interests protected by the statute. For good reason: As Judge Sentelle has explained, "[t]he INA authorizes the immigration of family members of United States citizens and permanent resident aliens." *Legal Assistance for Vietnamese Asylum Seekers* v. *Dep't of State*, 45 F.3d 469, 471-72 (D.C. Cir. 1995). "Given the nature and purpose of the statute," resident family members of those aliens "fall well within the zone of interest Congress intended to protect." *Id.* at 472. And any Government argument to the contrary is now waived.

Once again, the Government does not dispute that Hawaii has suffered injuries-in-fact. Rather, the Government claims that these injuries are "post-complaint developments [that] are irrelevant to standing," because the "90-day suspension would have expired but for the injunctions in this case." Suppl. Br. 10. Nonsense. At the moment the Complaint was filed, the University was in the process of selecting its students for the following year. The Order interfered with that process. C.A. E.R. 118-128. It would have banned students who had applied to the University for admission, and whom the University was actively considering. But for the injunction, the University would have had to choose what students to accept and prospective students would have had to decide whether to enroll while a travel ban—which by its terms may be indefinitely expanded, *see* Order § 2(c)—was in place. The impact on the University was thus "concrete" and "imminent" at the time the Complaint was filed. *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

That does not mean that the supplemental declaration filed after the Complaint with updated information about admitted students is, as the Government would have it, "irrelevant." Suppl. Br. 10. Rather, it provides further detail on a harm that was already occurring at the time of filing, elaborating on the situation of the very same students referred to generally in the initial declaration. Suppl. Add. 22-23 (the "declaration merely provides greater detail regarding the students who may be unable to join the academic community this fall * * * .").

The Government also suggests—in one conclusory sentence—that "nothing in the INA supports the notion that a public university has a cognizable right to

compel the entry of an alien abroad." Suppl. Br. 10-11. Not so. The INA has numerous provisions addressing nonimmigrant visas for students, scholars, and teachers. *See* 8 U.S.C. §§ 1101(a)(15)(F), (a)(15)(J), (a)(15)(H), (a)(15)(O); *see also* 8 C.F.R. § 214(f). Accordingly, the University's "claims of injury it suffered as a result of the statutory violations are, at the least, '*arguably* within the zone of interests' that the [INA] protects." *Bank of Am. Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1303 (2017). As the Ninth Circuit put it, "[t]he INA leaves no doubt that the State's interests in student- and employment-based visa petitions for students and faculty are related to the basic purposes of the INA." Suppl. Add. 27.

As for the harm to the State's refugee program stemming from the refugee ban and cap, the Government has only one response: Hawaii has no standing because "'[t]he authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.'" Suppl. Br. 11 (quoting *Arizona* v. *United States*, 567 U.S. 387, 409-410 (2012)). In fact, the Court in *Arizona* noted that "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States." 567 U.S. at 397. That is why "*both* the National and State Governments have elements of sovereignty that the other is bound to respect"—even in the immigration context. *Id.* at 398 (emphasis added). And here Hawaii has a distinct sovereign interest in effectuating its refugee policies. Moreover, Hawaii will suffer a straightforward pocketbook harm in the loss of federal money for its refugee program. *See* Haw. Administrative Code §§ 17-661-6 to -21 (State refugee resettlement program); 45 C.F.R. §§ 400.45 to 400.69 (federal

refugee cash assistance program); *see also id.* §§ 400.4 to 400.13 (grants to states for refugee resettlement). Nor is the refugee program the only state policy the Order undermines. It also interferes with the State's sovereign right to establish and enforce policies barring discrimination on the basis of national origin or religion.

c. Finally, the Government makes a half-hearted attempt to rebut respondents' strong showing of Establishment Clause standing. It bizarrely claims that respondents "never explain how the Order's application to aliens abroad violates respondents' *own* rights under that Clause." Suppl. Br. 26. That is simply untrue. *See* Stay Opp. 13-18. The Order denigrates Dr. Elshikh's faith, harms his religious community, and separates and stigmatizes his family. It also harms the University of Hawaii, decreases Hawaii's tax revenue, impairs its ability to welcome refugees, and undoes the State's sovereign right to bar the establishment of a religion. Those harms are real, and undoubtedly cognizable under the Establishment Clause. *See McGowan* v. *Maryland*, 366 U.S. 420, 430-431 (1961).

In the end, the Government's approach to standing is Kafka-esque: Dr. Elshikh's claim is now unripe, but if he waits until the consular official acts it will be either moot or blocked by consular nonreviewability. The State lacked standing when the suit was filed because the harm to its University was too speculative, but the Court may not consider the concrete evidence Hawaii submitted that proves admissions were and are being affected. The harms respondents would imminently suffer were this Court to grant the stay are irrelevant, because if the District Court had just let the ban go into effect the 90-day suspension would be up. And so on.

The only time the Government has conceded that *anyone* would have standing to challenge the Order—during oral argument in the first Ninth Circuit appeal[4]—it moved the goalposts when a plaintiff fitting that exact description (Dr. Elshikh) joined this suit. Justiciability is not a shell game.

B. The Order Exceeds The President's Statutory Authority.

The Ninth Circuit correctly held that the President exceeded his statutory authority by purporting to forbid every alien from six nations, and all refugees, from entering the United States. As the Court of Appeals explained in detail, that sweeping ban contravenes Congress's will as expressed in four statutes, exceeds the scope of Section 1182(f) itself, and flouts the structure of the immigration laws and the uniform practice of Presidents for six and a half decades. Suppl. Add. 33-61. The Government responds with a claim of staggering breadth: that this little-used subsection of the immigration laws in fact confers on the President limitless authority—an "absolute right," in the President's words[5]—to seal the Nation's borders to whomever he wishes, whenever he wishes, regardless of what the statutes enacted by the People's representatives say and without so much as a patina of judicial review. That is not the law, nor does that unbridled claim to authority have any home in a nation governed by the rule of law.

---

[4] In response to a question, the Government conceded that "a U.S. citizen with a connection to someone seeking entry" would have standing to "make a constitutional challenge" to a Muslim ban. *Washington* v. *Trump*, No. 17-35105 (9th Cir.), Oral Arg. Rec. 24:28-24:47.

[5] Sopan Deb, *Trump Continues To Question Obama's Commitment to Fighting Terror*, CBS News (June 14, 2016), https://goo.gl/TzQ5aj.

1. The President's Authority Under Section 1182(f) Is Subject To Statutory Limits.

The proper starting-point in reviewing the Order is not, as the Government asserts, the President's unilateral "assessment of the national interest." Suppl. Br. 2. It is the Constitution. And that document says clearly that "[t]he *Congress* shall have Power * * * to establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8 (emphasis added); *see Arizona*, 567 U.S. at 409 (explaining that the immigration power is given "*exclusively* to Congress" (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)) (emphasis added)). In times of war or true "national emergency," or where Congress cannot swiftly act, the President of necessity has a measure of independent constitutional authority and his powers are at their zenith. *U.S. ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543, 546 (1950); *see also Dames & Moore*, 453 U.S. at 678 ("Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take" in response to a national emergency); *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976). Otherwise, however, the President must act within the scope of authority that Congress delegated him—authority that, whatever its breadth, cannot be (and assuredly is not) so broad as to abdicate Congress's immigration authority wholesale to the Executive.

Section 1182(f) accords with these fundamental separation-of-powers principles. Congress enacted this provision principally to "authorize the executive to exercise the [exclusion] power * * * for the best interests of the country during a time of national emergency." *Shaughnessy*, 338 U.S. at 543 (discussing precursor of Section 1182(f)). The provision thus grants the President wide latitude in

responding to circumstances that Congress did not or could not address. Stay Opp. 29; *Dames & Moore*, 453 U.S. at 669 (Congress often authorizes the President to act "in response[] to international crises the nature of which Congress can hardly have been expected to anticipate in any detail"). The President, however, does not claim to invoke Section 1182(f) in response to any exigency, and for good reason: Congress has legislated regarding the precise circumstance this Order purports to address, *see* 8 U.S.C. § 1187(a)(12), and the problems the Order describes are years or decades old, *see* Order § 1(e), (h).

Accordingly, as respondents and the Ninth Circuit have explained, the President must adhere to several basic limits in exercising his 1182(f) authority. Under ordinary principles of statutory construction, he cannot use Section 1182(f) to circumvent other parts of the immigration code or render Congress's extensive handiwork "mere suggestions." *Gonzales* v. *Oregon*, 546 U.S. 243, 260-261 (2006); *see* Stay Opp. 28; Suppl. Add. 61. Nor can he invoke that provision in a manner antithetical to the structure or policies of that statute. *See* Stay Opp. 31. Furthermore, the President must comply with the express precondition for invoking 1182(f), by "find[ing]" that the entry of the covered "class of aliens * * * would be detrimental to the interests of the United States." *Id.* at 32; *see* Suppl. Add. 35-48.

Remarkably, the Government appears to reject all of these limits on the President's Section 1182(f) authority—or any others besides. It asserts that the President may invoke Section 1182(f) for as long as he wishes, and for any reason he chooses. *See* Suppl. Br. 13, 20-21. It contends that Section 1182(f) takes precedence

over even express text limiting the President's authority. Suppl. Br. 22, 26 & n.6. And it strenuously argues that courts may not even examine whether the President has made the "find[ing]" that Section1182(f) requires. *Id.* at 13-14. In its view, "[n]othing more is required" to unlock this power than the President's say-so that any or all aliens would be "'detrimental' to the Nation's interests." *Id.* at 21.

If the Government prevailed, Section 1182(f) would thus grant the President something the Constitution denies him: a unilateral and practically limitless immigration power. He could invoke this provision to revive the "national origins" system Congress abolished in 1965, to block unmarried aliens from the country, or to categorically exclude university professors, all in direct contravention of Congress's will. *See* 8 U.S.C. § 1152(a)(1)(A) (prohibiting nationality discrimination); *id.* § 1153(a)(1) (allocating visas to unmarried children of citizens); *id.* § 1153(b)(1) (allocating visas to aliens with advanced degrees). He could exclude vast swathes of aliens from the country based on whim or personal pique. In effect, he could establish his own Executive immigration system, exempt from constraint by Congress or oversight by the federal judiciary.

That breathtaking position has no basis in law or precedent. In *Sale*, the Court closely scrutinized the President's exercise of his 1182(f) power to ensure it complied with the text and structure of other provisions of the immigration laws. 509 U.S. at 171, 187. Similarly, in *Kent* v. *Dulles* and *Zemel* v. *Rusk*, the Court reviewed the President's exercise of even broader discretion than Section 1182(f) grants—to "designate and prescribe [rules for granting passports] for and on behalf

of the United States"—to ensure it was fundamentally reasonable and accorded with the statutory scheme. *Kent*, 357 U.S. 116, 123, 128 (1958); *Zemel*, 381 U.S. 1, 7-8, 17-18 (1965); *see also United States* v. *Witkovich*, 353 U.S. 194, 195, 199-200 (1957). As then-Judge Ginsburg explained in *Abourezk* v. *Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987), Section 1182(f) permits the President to exclude a "class of [aliens] that is *not* covered by one of the categories" Congress elsewhere addressed; he cannot use it (any more than other broad grants of authority) to "evade" or "nullify" the limits Congress imposed. *Id.* at 1049 n.2, 1057 (emphasis added); *see also Allende* v. *Shultz*, 845 F.2d 1111, 1118 (1st Cir. 1988) (Bownes, J., joined by Breyer, J.).

2. The Order Is Irreconcilable With The Statute.

Once subjected to any statutory review, the Order falls. As respondents have explained, and as the Ninth Circuit agreed, the Order contravenes numerous provisions of the immigration laws and fails to satisfy the preconditions for invoking Section 1182(f) itself. The Government ignores most of these arguments, and the few responses it musters are meritless.

a. The Government offers no rejoinder to respondents' argument that the Order unlawfully circumvents and "render[s] superfluous" for 180 million aliens the finely reticulated terrorism bar Congress codified in Section 1182(a)(3)(B). Suppl. Add. 61-62 (explaining that the Order is "incompatible with the expressed will of Congress" as embodied in "§ 1182(a)(3)(B)'s criteria for determining terrorism-related inadmissibility"). The Government simply cites two pages of its Court of

Appeals brief in which it observed that the Order does not claim that all prohibited aliens are "potential terrorists," only that the Government is unsure which of them might be terrorists. C.A. Reply Br. 24-25; *see* Suppl. Br. 26 n.6. That is an empty distinction. The terrorism bar expressly addresses itself to situations of uncertainty: It permits the Executive to exclude aliens if there a "reasonable likelihood" they may be terrorists. 8 U.S.C. § 1182(a)(3)(B)(i)(II). Furthermore, Congress explicitly considered the terrorism risk posed by nationals of these countries, and decided that visa-vetting procedures were adequate to address them. Suppl. Add. 42-43 (citing 8 U.S.C. § 1187(a)(12)). The President cannot ignore those judgments, and render both statutes effective nullities, by adopting a "contrary" policy. *Id.* at 42.

b. The Government also fails to rebut—indeed, entirely ignores—respondents' argument that the Order is irreconcilable with the structure and policies of the modern immigration system. Contrary to every other provision of the immigration laws, the Order excludes aliens based on "'invidious discrimination'" founded on their nationality or refugee status, rather than each alien's own "'fitness to reside in the country.'" Stay Opp. 31 (quoting *Judulang* v. *Holder*, 565 U.S. 42, 53 (2011)); *Wong Wing Hang* v. *INS*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.)). The Government (at 22) depicts *Sale* as if it approved nationality discrimination, but that is grossly misleading; the Order at issue in *Sale* was entirely neutral, and did not single out Haitians in any way. *See* 509 U.S. at 165 n.13. The Government also claims (at 15) that past orders have engaged in similar discrimination. The

sole example that the Government identifies, however, is a 1986 order, never reviewed by courts, that halted some immigration from Cuba. That order did not exclude Cubans because of generalizations about their dangerousness or potential harm to the country, but rather because Cuba itself had breached an immigration agreement with the United States. Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986). It provides no precedent for the dragnet ban the President seeks to impose. *See* Suppl. Add. 39-40 n.13.

c. Moreover, as the Ninth Circuit explained in detail, the Order fails to satisfy the prerequisite for invoking Section 1182(f) itself. Suppl. Add. 35-48; *see* Stay Opp. 32. The President and his attorneys have offered three sets of rationales for the Order's bans on entry. None constitute a "find[ing]" of any link whatsoever between the "entry of the class[es] of aliens" excluded by the Order and a "detriment[] to the interests of the United States."

First, the Order justifies its entry ban on the ground that it will free up resources to conduct an administrative review of vetting procedures. Order § 2(c) (restricting entry in order to "temporarily reduce investigative burdens on relevant agencies" while vetting procedures are reviewed). As the Ninth Circuit explained, this rationale offers no basis for distinguishing the classes the President has singled out for exclusion. Suppl. Add. 37. Furthermore, it does not relate to a harm that the "*entry*" of those aliens would cause. And the new Presidential Memorandum proves that the review can proceed without the bans. Rightly, then, the

Government does not even attempt to defend this "find[ing]" as a basis for invoking Section 1182(f).

Second, the Order claims at length that the covered aliens are more likely to engage in terrorism because the countries the President singled out have become safe havens for terrorists. *See* Order §§ 1(e), (h), 2(c); *see also* Exec. Order 13,769 §§ 1, 3(c), 82 Fed. Reg. 8977 (Jan. 27, 2017). The Government's unhurried pace throughout this litigation has already exposed this rationale as a sham: If the Government truly believed the Order was necessary to exclude terrorists from the country, it would surely not have agreed to months-long delays in the Courts of Appeals or invited this Court to wait until October (or later) to adjudicate the merits of this case. In any event, as the Ninth Circuit explained, this rationale provides no basis for thinking that all *nationals* of the six covered countries, let alone all refugees, pose a threat of terrorism. The Order extends to millions upon millions of nationals who do not reside in the covered countries and have not lived there for decades (if ever), making the conditions in those countries irrelevant to any threat they pose. Suppl. Add. 41; *IRAP et al. v. Trump, et al.*, 857 F.3d 554, Slip Op. at 87 (4th Cir. May 25, 2017) (Keenan, J., concurring). It also extends to residents of those countries who could not be terrorists under any definition. And the local conditions the Order describes provide no basis for a worldwide ban on refugees or an annual cap on refugee admissions at 50,000. The Government appears to acknowledge as much, as it now claims that this second rationale "fundamentally misunderstands" the basis for the Order, too. Suppl. Br. 18.

Instead, the Government hinges its defense on a third rationale, one almost entirely absent from the Order itself. It now says that admitting these aliens would be "detrimental" to U.S. interests because immigration officers may not possess adequate information to determine whether those aliens are terrorists. *Id.* This post-hoc explanation collapses on the slightest scrutiny. The immigration laws already forbid immigration officers from admitting aliens to the United States if they lack information to determine whether they are inadmissible, as terrorists or otherwise. *See* 8 U.S.C. § 1361 (imposing burden of proof on alien to show he is "not inadmissible"); *id.* § 1202(b)-(d) (requiring alien seeking admission to produce specified documents or "other satisfactory evidence" regarding his background). This newly minted rationale therefore purports to correct with an axe a problem that the immigration laws have already solved with a scalpel. It is akin to the President deeming a class of aliens inadmissible because it may include aliens who will become public charges, even though the law already requires the exclusion of any alien who cannot prove that he will be able to support himself. *Id.* § 1182(a)(4).

Furthermore, the Order's design contradicts this new rationale. It expressly permits immigration officers to admit aliens on a case-by-case basis. Order §§ 3, 6(a). That scheme necessarily presumes officers *would* have adequate information to determine whether they are terrorists; otherwise, the admissions would in fact be illegal. There is no logical reason why the Government would be able to obtain adequate information concerning the numerous groups eligible for waivers but not the remaining aliens the Order covers.

In any event, even granting the Government its premise, this justification does not provide any basis for what the President now seeks in this litigation: a fresh 90-day ban whenever the injunction is lifted. *See* Resp. Suppl. Add. 1-2. The Government has already had well more than 90 days to conduct the review it claims is necessary to determine what information it needs to vet the covered aliens and to adjust its vetting procedures accordingly. Indeed, by the time the Court issues a decision on the merits, it will have had at least nine months do so. The President's "find[ing]" has by its own terms lapsed; even if at one point it could have satisfied the prerequisite for invoking Section 1182(f), it can no longer do so.

Unable to meaningfully defend the Order's "findings," the Government claims that courts cannot review whether Section 1182(f)'s textual requirements are satisfied because the statute vests the President with discretion to "find[]" whether the entry of a class of aliens "would be detrimental to the interests of the United States." Suppl. Br. 13-14. That is a *non sequitur*. The President of course has broad discretion to determine whether aliens would harm the national interest if admitted. But the President does not have discretion to dispense with Section 1182(f)'s explicit requirement that he actually *find* that the aliens he has chosen to exclude would harm the United States. Under well-established principles of reviewability, courts have the duty to ensure that this "compulsory prerequisite[]" is satisfied. *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1648 (2015). Moreover, they must ensure that the President "actually, and not just purportedly" satisfies that prerequisite. *Id.* at 1653. The President could not, for instance, discharge his

"finding" obligation—and unlock the broad powers Section 1182(f) grants—by "find[ing]" that the Irish must be excluded because they are incorrigible criminals or "find[ing]" that all immigration must be halted because visas are printed on paper of the wrong color. No more can he assert that the entry of all nationals of six countries, and all refugees worldwide, is "detrimental" to the United States by asserting a series of justifications that bear no rational relationship to the ordered exclusions. *Cf. Bowen* v. *Am. Hosp. Ass'n*, 476 U.S. 610, 626-627 (1986).

d. Finally, as the Ninth Circuit correctly held, the President's Order flatly violates two other express statutory limits. First, Section 2(c) of the Order contravenes 8 U.S.C. § 1152(a)(1)(A)'s clear prohibition on discrimination in the issuance of immigrant visas because of nationality. The Government seeks to engage in such discrimination twice over: It says that nationals from six countries may not obtain immigrant visas, and that even if they do, the Government will deny those visas any legal effect. Stay Opp. 32; *see* Suppl. Add 51-52. The Government does not dispute that this blatant discrimination violates Section 1152; it simply claims (at 22) that Section 1182(f) should take precedence over 1152. Every available canon of construction instructs otherwise: Section 1152 is more specific, later in time, and includes several detailed and highly specific exceptions that do not include Section 1182(f). Suppl. Add. 52-53. Reading Section 1152 according to its terms does not impliedly repeal Section 1182(f); it is simply a normal part of

"reconciling many laws enacted over time, and getting them to 'make sense' in combination." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988).[6]

Second, Section 6 of the Order violates Section 1157. Suppl. Add. 56-60. That statute sets a detailed, forward-looking process the President must follow before setting the number of refugees that "may be admitted" in an upcoming fiscal year: He must, *inter alia*, consult with various interest stakeholders and Congress, 8 U.S.C. §§ 1157(a)(3), (e); provide notice of, and typically an opportunity for hearing on, his "proposed determination," *id.* § 1157(d)(2)-(d)(3)(A); and announce what the number "shall be" before the beginning of the fiscal year, *id.* § 1157(a)(3). President Obama followed precisely that process and determined that 110,000 refugees "may be admitted" in fiscal year 2017. Suppl. Add. 56-57. In the Order, the President purports to overturn that decision, but without following any of the timing or consultation procedures that Section 1157 requires. He simply states that the number of refugees that "may be admitted" this year shall now be zero for four months, and then 50,000 for the remainder of the year. Order § 6(a)-(b). Section 1157 plainly bars the President from treating its requirements as optional in this manner. The Government's only defense (at 24) is that Section 1157's procedures do not apply because the President is *lowering* the refugee target. There is no textual basis for this distinction. When lowering the refugee target, no less than

---

[6] The Government's claim (at 23) that this reading would raise constitutional concerns is meritless. Congress has given the President authority to draw nationality distinctions if the Nation is at war or on the verge of war. 50 U.S.C. § 21. And as Judge Sentelle has explained, Section 1152 would plainly not prohibit nationality distinctions necessary to meet a "most compelling" need like a national emergency. *Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 473.

when raising it, the President is altering the number of refugees that "may be admitted," and thus the statute's procedures control.

In short, because the Constitution grants Congress, not the President, the power to regulate immigration, and because the Order plainly transgresses Congress's will, the Government has no likelihood of success on the merits.

C. The Order Is Unconstitutional.

The Government's failure to recognize that *Congress* holds the plenary immigration power also infects its strained defense of the Order's constitutionality. The Government claims (at 27) that *Mandel* must apply to sweeping Executive policies because in *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977), the Court applied a similar standard to a *statute* enacted by Congress. There is, of course, every reason for courts to afford greater deference to the immigration policies of the body the Constitution entrusts with authority over immigration. *See* U.S. Const. art. I § 8. Further, when Congress legislates, it is operating within its traditional constitutional sphere, and the Constitution's structural checks apply in full force. The need for heightened judicial review is accordingly diminished because the threat of arbitrary or unlawful government action is curtailed by the very fact that Congress is a diverse body that must act through regular processes, including bicameralism and presentment. *See INS* v. *Chadha*, 462 U.S. 919, 958 (1983); *see also Salazar* v. *Buono*, 559 U.S. 700, 727 (2010) (Alito, J., concurring) (explaining that "our country's religious diversity is well represented" in Congress). But when the President unilaterally exercises broad policymaking power, the danger of

arbitrary or improperly motivated action is much higher, and the Court's standard of review must be more searching. *Chadha*, 462 U.S. at 958.[7]

The Government also continues to misread *Mandel*, focusing on a strained reading of that case's dissent that would grossly expand Executive power at the cost of individual rights. The Government argues (at 27) that *Mandel* must have foreclosed any consideration of officials' "motivations," *but see Kerry* v. *Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring), because the *Mandel* dissent asserted that the Government's rationale in that case was a "sham." But, even if it were appropriate to interpret the majority through a dissent, the Government is still missing Justice Marshall's point. He was not imploring the Court to consider statements by Executive officials suggesting they were pursuing another, unconstitutional purpose, because *there were none*. Stay Opp. 23. Instead, Justice Marshall wanted the majority to consider the absence of facts supporting the Government's asserted purpose. 408 U.S. at 778 (Marshall, J., dissenting). That is very different from a case—like this one—where the Executive has made statements indicating that his purported rationale is pretextual. And, more importantly, the Government still has not explained why the Court should adopt a standard that would permit the Executive to engage in all manner of unconstitutional acts merely by asserting a remotely plausible national security rationale. *See* Stay Op. 22.

---

[7] **For the same reasons, the Government's citation (at 27) to *Sessions* v. *Morales-Santana*, No. 15-1191 (June 12, 2017), does not advance its cause. In *Sessions*, the Court acknowledged only that something akin to rational basis review might be appropriate for a *statute*, not a sweeping Executive policy.**

In any event, the Government's constitutional problems have only increased since respondents filed their stay opposition because the Government's stated national security rationale can no longer pass muster even under its own misguided reading of *Mandel*. At a bare minimum, *Mandel* requires a "facially legitimate" rationale for a challenged policy, 408 U.S. at 770, and the Government no longer has one. As noted, the Government's national security rationale for the travel and refugee bans depended on their running contemporaneously with the review and upgrade of vetting procedures. *See, e.g.*, Stay Appl. 10 ("The temporary suspension's explicit purpose is to enable the President * * * to assess whether current screening and vetting procedures are adequate to detect terrorists seeking to infiltrate the Nation." (citing Order § 1(f)). But the President's June 14 memorandum decouples the bans from the vetting upgrade they allegedly facilitate. *See supra* pp. 1-2, 5-7. Because there is *no* remaining facially legitimate secular rationale for the Order, the Government can no longer dispute what has always been obvious: The travel and refugee bans represent an unconstitutional effort by the President to fulfill his campaign promise to enact a Muslim ban.

The Government's supplemental brief offers *nothing* to refute that. In its *IRAP* briefing, the Government repeats its mantra that courts may not consider campaign statements. But the Government has previously taken exactly the opposite position, arguing that pre-election assertions of religious animus are "highly probative evidentiary sources in assessing whether [there is] discriminatory intent." U.S. Reply Br. at 6, *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, Nos. 94-

7103-94-6048, 94-6125 (2d Cir. 1995)(1994 WL 16181393). And again, the extensive post-inauguration evidence is sufficient to demonstrate the President's impermissible purpose, particularly in light of the fact that his asserted secular rationales have proved illusory.

II. THIS COURT SHOULD NOT STAY THE INJUNCTION.

Because the decision below is correct, the Government cannot show that this Court is likely to grant certiorari and vacate the underlying judgment. For that reason alone, a stay should be denied. But a stay is also unwarranted because the harm to the respondents that the Order would inflict justifies preserving the entirety of the injunction the Ninth Circuit affirmed.

A. The Equities Favor Maintaining The Injunction.

The harms threatened by the Order are imminent and real: If the Court grants a stay, Dr. Elshikh and his family will be separated from his mother-in-law. He and the members of his mosque will suffer the "indignity of being singled out for special burdens on the basis of [their] religious calling"—a "concrete harm" that "can never be dismissed as insubstantial." *Locke* v. *Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting). Admitted students will be blocked from attending the University of Hawaii, tourists will be unable to visit, and the State's refugee program will be halted.

On the other side of the scale, the only harms the Government has identified are either abstract or nonexistent. First, it says that the injunction "interferes with the President's judgments." Suppl. Br. 28. That is a variant of the argument that

any injunction of Federal Executive action is *ipso facto* irreparable harm, which is belied by this Court's repeated refusals to grant a stay merely because some federal law or policy has been enjoined. *See, e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers); *Commodity Futures Trading Comm'n* v. *British Am. Commodity Options Corp.*, 434 U.S. 1316, 1320 (1977) (Marshall, J., in chambers). The Government also claims that, while it has in fact proceeded with "implementing new screening procedures," that is "different from *** ensuring that foreign *governments* are willing and able to 'share or validate important information about individuals seeking to travel to the United States.'" Suppl. Br. 29 (quoting Order § 1(d)). That is of course true, but there is *nothing* in the present injunction that prohibits the Federal Government from working with foreign governments to improve the information it receives. And the Executive retains the ability—indeed, the obligation—to deny a particular visa application if it feels that information is inadequate. *See supra* p. 24.

Moreover, a stay would dramatically upend the status quo, and usher in the very chaos that attended the rollout of the first iteration of this Order. "[T]he maintenance of the status quo is an important consideration in granting a stay," and "here it can be preserved only by denying one." *Dayton Bd. of Educ.* v. *Brinkman*, 439 U.S. 1358, 1358-59 (1978) (Rehnquist, J., in chambers)).

B. The Scope Of The Injunction Is Proper.

There is also no reason to limit the injunction in the dramatic fashion the Government proposes. The Ninth Circuit has already narrowed the injunction and

obviated the concern at the heart of the Government's objection in its stay application. The Government now argues—in a mere two sentences—that the injunction "goes far beyond redressing violations of respondents' own rights," and that it should be confined to "Dr. Elshikh's mother-in-law." Suppl. Br. 30.

That is false. In the Establishment Clause context, this Court has made clear that when a government policy is motivated by an impermissible purpose, *all* applications of that policy are tainted, and therefore all are illegal. *See Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 314 (2000). The same goes for the statutory violation. If an Executive Branch policy itself contravenes a statute, it is invalid in all its applications, and the policy should be struck down on its face. In *Gonzales* v. *Oregon*, for instance, the Court held that an "Interpretive Rule" of the Department of Justice was inconsistent with a statute, and therefore affirmed a "permanent injunction against the Interpretive Rule's enforcement"—not just against the parties, but against anyone. 546 U.S. at 254, 274-275. That is the Court's general practice, and it should be followed here. *See Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 42-43 (1990); *Pittston Coal Grp.* v. *Sebben*, 488 U.S. 105, 113-119 (1988); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-432, 448-449 (1987).

The Government has also suggested that facial relief is not appropriate at the preliminary injunction phase. That is untrue. "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) (quotation

marks omitted). Where a plaintiff has shown a likelihood of success on an issue that would warrant facial relief, a court should award facial relief.

Indeed, this Court has awarded facial relief at the preliminary injunction phase in the First Amendment context before. *Reno* v. *Am. Civil Liberties Union*, 521 U.S. 844, 861-862 (1997). It has also affirmed a pre-enforcement preliminary injunction of a State abortion law. *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 753-754 (1986). And it has even *issued* an injunction pending certiorari blocking the nationwide enforcement of statutory amendments that would have had a "pervasive impact * * * on every state and municipal government in the United States." *Nat'l League of Cities* v. *Brennan*, 419 U.S. 1321, 1322 (1974) (Burger, C.J., in chambers), *stay continued*, 419 U.S. 1100 (1975).

The Court should accordingly uphold the full scope of the preliminary injunction as narrowed by the Ninth Circuit. Nothing less would remedy the constitutional and statutory violations or adequately guard against harm to the respondents. The application of the Order to *anybody* would denigrate the Muslim faith, and harm Dr. Elshikh, his family, and his mosque. And a partial stay that only allows in the students that have already committed to attend the University would leave unremedied the harm inflicted on the State as a result of the countless other students, tourists, and refugees who would be blocked or chilled from traveling to Hawaii. Indeed, to grant a stay of any sort would effectively hand the Government a victory on the merits, since, on the Government's proposed schedule,

the case would likely not be decided until the travel and refugee bans have expired. The Court should preserve the status quo and deny the stay application.

III. CERTIORARI IS NOT WARRANTED.

1. There is no need for the Court to grant certiorari to review the Ninth Circuit's interlocutory order. Even an "intrinsically important" legal issue does not warrant review in this Court when "time w[ill] soon bury the question." Robert L. Stern *et al.*, *Supreme Court Practice* 243, 245 (8th ed. 2002). For example, the Court generally will not grant review when a statutory provision that has engendered a circuit split is no longer in force. *See United States* v. *Varca*, 896 F.2d 900, 906 n.9 (5th Cir. 1990) (noting 5-4 circuit split regarding repealed parole statute), *cert. denied*, 498 U.S. 878 (1990).

Here, the dispute over whether the President may implement his travel and refugee bans will soon become largely academic. As noted, the President's June 14 Memorandum clarifies that the "effective date" for each provision in the Order is the date on which any injunction is lifted. Because the Ninth Circuit vacated the injunction of the "internal-facing" parts of the Order last week, it is virtually certain that the internal reviews contemplated by Sections 2 and 6 will be complete within the next several months. Once those reviews are complete, even the Government's pretextual rationale for the bans will have disappeared and this Court's review will serve no practical purpose. *Cf. Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (holding that a dispute regarding the propriety of an injunction is moot where "[n]o order of this Court could affect the parties' rights").

This Court reserves certiorari jurisdiction for legal problems that are of ongoing significance and that demand resolution by the Court—not for issues merely "academic or * * * episodic." *Rice* v. *Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Certiorari is unwarranted.

2. In any event, the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of certiorari) (collecting cases). The Court sometimes deviates from that rule in order to review a preliminary injunction that creates a circuit split or inflicts irreparable harm on the defendant. But where, as here, neither of these conditions apply, there is no reason for this Court's review.

a. There is quite obviously no split of authority in the Courts of Appeals. To the contrary, both the Fourth Circuit, sitting *en banc*, and a unanimous Ninth Circuit panel have upheld the need for a preliminary injunction of the Order's entry ban, the common question reviewed by both. While the Government repeatedly emphasizes that the Ninth Circuit upheld the injunction on statutory rather than constitutional grounds, it appears to misunderstand the implication of that holding. The Ninth Circuit did not eschew a constitutional ruling because it believed the Order was constitutional. It did so because it was "[m]indful of the Supreme Court's admonition that 'courts should be extremely careful not to issue unnecessary constitutional rulings'" and because the statutory violations were sufficiently blatant that there was no need to reach the constitutional question at all. Suppl.

Add. 14-15. When an Order has been held unlawful for multiple independent reasons, the need for certiorari review is diminished, not increased, because it is less likely that a decision of this Court would change the bottom-line outcome.

b. The case for granting certiorari at this interlocutory stage therefore depends entirely on the Government's assertion that it will be irreparably harmed by the delay in implementation of its Executive Order if the Court denies review. But the Government's litigation conduct eviscerates that claim. The Government asserts (at 28) that it has acted with haste, but the record clearly indicates otherwise. After the Ninth Circuit declined to stay the Washington District Court's injunction of the first Order on February 9, 2017, the Government could have filed an immediate appeal or moved for a stay. Instead, it waited nearly a month to issue a revised Order. C.A. E.R. 156. When the Hawaii District Court enjoined Sections 2 and 6 of the Revised Order on March 15, the Government could have stipulated to the conversion of the TRO to a preliminary injunction and sought emergency review in the Ninth Circuit and subsequently in this Court. Instead, it drew out proceedings in the District Court, and then agreed to brief its stay motion on the same schedule as its merits appeal. The Government proposed a similar briefing schedule in the Fourth Circuit.

These stall tactics are all the more confounding given that the lower courts have bent over backwards to facilitate accelerated consideration of challenges to the first and second Order. Recognizing the Government's professed need to protect the Nation's security, lower courts have set expedited briefing schedules and rendered

their judgments swiftly. *See, e.g.*, Order, *Washington* v. *Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017) (setting a three day briefing and argument schedule); Order, *IRAP* v. *Trump*, No. 17-1351 (4th Cir. Apr. 10, 2017) (granting initial en banc review); Add. 1-2, 25-26 (entering TRO and PI orders within hours of oral argument). It is the Government that has prolonged the litigation.

Perhaps most strikingly, it is the Government that has pursued a schedule under which this Court would not even begin to consider the merits of the preliminary injunction until *six months* after the injunction was issued. The Government could have sought a stay of the injunction from this Court as soon as the lower court ruled. It also could have sought a stay or even certiorari before judgment from this Court as soon as it became clear that the court of appeals process would take months. The Government did neither. And, even after both the Ninth and Fourth Circuits affirmed the preliminary injunctions of the Order's travel and refugee bans, the Government still has not asked for expedited review on the merits, declaring itself content to wait until the beginning of the next October Term whether or not a stay is granted.

This is not how the Government behaves when it believes that an Executive Order must be implemented immediately. For example, in *Dames & Moore*, a case arising from the Iranian hostage crisis, the petitioner filed for certiorari before judgment in this Court to insist that it immediately enjoin the United States and Secretary of Treasury from implementing executive actions that would block the transfer of certain Iranian assets. 453 U.S. at 654. The petition was filed on June

10, 1981; the Solicitor General then requested that this Court order expedited briefing and argument, alerting the Court that "unless the Government [transferred the contested assets to Iran] by July 19, 1981, Iran could consider the United States to be in breach" of their executive agreement. 453 U.S. at 660, 667-668. The Court complied, ordering briefing and argument to be completed within two weeks. On July 2, 1981, it decided the case. *Id.*; *Dames & Moore* v. *Regan*, 452 U.S. 932, 932-933 (1981) (granting petitions); *see also United States* v. *Nixon*, 418 U.S. 683, 686-690 (1974) (after the district court entered judgment on May 20, 1974, the United States petitioned for certiorari before judgment and requested expedited briefing, argument was heard on July 8, and the Court rendered judgment on July 24); *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 269 (1947) (similar).

By contrast, the Government has made clear through its actions that there is no deep urgency to the implementation of its travel and refugee bans. For that reason, there is no need for this Court to depart from its usual practice of declining certiorari until there is a final judgment from the lower courts. To the extent there are any compelling constitutional or statutory issues after final judgment, this Court can grant certiorari then.

c. Moreover, there is little danger that denying review will leave in place precedent that constrains the Executive in the future. As *Dames & Moore* explained, cases regarding the permissibility of an exercise of Executive power "afford little precedential value for subsequent cases" because the analysis is highly fact specific. 453 U.S. at 661; *accord id.* at 661-662 (stressing that the Court's

decision regarding this "one * * * episode" of executive action "lay[s] down no general 'guidelines'" and is "confine[d]" to the specific case). That is particularly true here. The decisions of the Ninth and Fourth Circuits below apply to a *sui generis* set of facts, never before seen in this country and unlikely to be seen again. Simply put, this case will serve as precedent in only one set of circumstances: those in which a President issues a blatantly unlawful and unconstitutional Executive Order, while openly professing that he has no obligation to adhere to the statutory dictates of Congress and freely indicating that he is pursuing unconstitutional religious discrimination. There is no reason to grant certiorari in this case.

3. However, should the Court grant review in *IRAP*, respondents consent to the Government's request that the Court also "grant certiorari [here] so that this case may be considered in tandem with *IRAP*." Suppl. Br. 2. Without granting certiorari in this case, the Court would not have the full range of issues before it. First, the injunction in this case, unlike *IRAP*, covers the refugee ban in Section 6 and is therefore broader. Second, the briefing and opinions below have touched on a wider range of statutory and constitutional arguments. And finally, the respondents here—a State and an Imam—present different cases for standing than the respondents in *IRAP*. In short, granting review in this case in tandem with *IRAP* is essential to enable the Court to explore the full range of jurisdictional and merits questions raised by the Order.

CONCLUSION

The application for a stay and the petition for certiorari should be denied.

Respectfully submitted,



NEAL KUMAR KATYAL*
COLLEEN ROH SINZDAK
MITCHELL P. REICH
ELIZABETH HAGERTY
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com
*Counsel of Record

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

SARA SOLOW
ALEXANDER B. BOWERMAN
HOGAN LOVELLS US LLP
1835 Market St., 29th Floor
Philadelphia, PA 19103

Counsel for Respondents

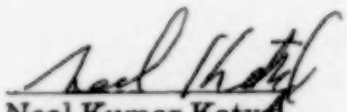
DOUGLAS S. CHIN
Attorney General of the State of Hawaii
CLYDE J. WADSWORTH
Solicitor General of the State of Hawaii
DEIRDRE MARIE-IHA
DONNA H. KALAMA
KIMBERLY T. GUIDRY
ROBERT T. NAKATSUJI
Deputy Attorneys General
DEPARTMENT OF THE ATTORNEY GENERAL,
STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

Counsel for the State of Hawaii

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Neal Kumar Katyal, a member of the Supreme Court Bar, hereby certify that one copy of the foregoing Supplemental Brief was served via electronic mail and Federal Express on June 20, 2017 on:

JEFFREY B. WALL
Acting Solicitor General
U.S. DEPARTMENT OF JUSTICE
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217
Counsel for Applicants



Neal Kumar Katyal

RESPONDENTS' SUPPLEMENTAL ADDENDUM

Presidential Memorandum, Effective Date in Executive Order 13,780, 82 Fed. Reg. 27965 (June 14, 2017) 1

Federal Register / Vol. 82, No. 116 / Monday, June 19, 2017 / Presidential Documents 27965

Presidential Documents

Memorandum of June 14, 2017

Effective Date in Executive Order 13780

Memorandum for the Secretary of State[,] the Attorney General[,] the Secretary of Homeland Security[, and] the Director of National Intelligence

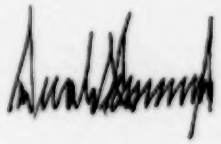
This memorandum provides guidance for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence in light of two preliminary injunctions that bar enforcement of certain provisions of Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States" (Mar. 6, 2017). The preliminary injunction entered by the United States District Court for the District of Maryland, and affirmed in substantial part by the United States Court of Appeals for the Fourth Circuit, bars enforcement of section 2(c) of the Executive Order. The portions of the preliminary injunction entered by the United States District Court for the District of Hawaii that were affirmed by the recent decision of the United States Court of Appeals for the Ninth Circuit bar enforcement of certain provisions of sections 2 and 6 of the Executive Order.

Various provisions of sections 2 and 6 of the Executive Order (as well as sections 3 and 12(c), which delineate the scope of the suspension contained in section 2(c)), refer to the Order's effective date. Section 14 of the Executive Order provides that the Order was effective at 12:01 a.m., eastern daylight time on March 16, 2017. Sections 2 and 6, however, were enjoined before that effective date, and the courts of appeals have affirmed the injunctions with respect to certain provisions of sections 2 and 6. As a result, under the terms of the Executive Order, the effective date of the enjoined provisions (as well as related provisions of sections 3 and 12(c)) is delayed or tolled until those injunctions are lifted or stayed.

In light of questions in litigation about the effective date of the enjoined provisions and in the interest of clarity, I hereby declare the effective date of each enjoined provision to be the date and time at which the referenced injunctions are lifted or stayed with respect to that provision. To the extent it is necessary, this memorandum should be construed to amend the Executive Order.

Because the injunctions have delayed the effective date of section 12(c), no immigrant or nonimmigrant visa issued before the effective date of section 2(c) shall be revoked pursuant to the Executive Order.

I hereby direct the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence to jointly begin implementation of each relevant provision of sections 2 and 6 of the Executive Order 72 hours after all applicable injunctions are lifted or stayed with respect to that provision, to ensure an orderly and proper implementation of those provisions. Prior to that time, consular officers may issue valid visas to, and the Secretary of Homeland Security may admit, otherwise eligible aliens without regard to sections 2 and 6. If not otherwise revoked, visas and other travel documents issued during this period remain valid for travel as if they were issued prior to the effective date.



THE WHITE HOUSE,
Washington, June 14, 2017

[FR Doc. 2017–12901
Filed 6–16–17; 11:15 am]
Billing code 3295–F7–P

Hogan Lovells

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Neal Kumar Katyal
T +1 202 637 5600
F +1 202 637 5910
neal.katyal@hoganlovells.com

Supreme Court, U.S.
FILED
OCT - 5 2017
OFFICE OF THE CLERK

October 5, 2017

Honorable Scott S. Harris
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

RECEIVED
OCT - 5 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Re: *Donald J. Trump, et al.* v. *State of Hawaii, et al.*, No. 16-1540

Dear Mr. Harris,

This letter is in response to the Court's order of September 25, 2017, requesting letter briefs from the parties addressing "whether, or to what extent, the Proclamation issued on September 24, 2017, may render cases No. 16-1436 and 16-1540 moot" and "whether, or to what extent, the scheduled expiration of Sections 6(a) and 6(b) of Executive Order No. 13780 may render those aspects of case No. 16-1540 moot." In brief, neither of these developments renders the existing dispute moot, and the Court may continue to hear the case. But if the Court deems it imprudent to address the questions presented in this posture, the proper course is to dismiss the petition as improvidently granted and permit the parties to litigate their dispute in the context of the Proclamation ("EO-3").

The "voluntary cessation of a challenged practice" does not moot a controversy unless and until the Government makes it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks omitted). Here, the Government has not even ceased to implement all of the challenged portions of Executive Order No. 13,780 ("EO-2"), as the refugee bar in Section 6(a) remains in place. But even if Section 6(a) is permitted to expire on October 24, the Government cannot come close to meeting its "heavy burden" to demonstrate that the bans will not be revived. *Id.* The Government has previously informed this Court that the President is free to revise the "temporal scope" of EO-2 whenever he wishes. Pet. Br. 37. And the President

Hogan Lovells US LLP is a limited liability partnership registered in the District of Columbia. "Hogan Lovells" is an international legal practice that includes Hogan Lovells US LLP and Hogan Lovells International LLP, with offices in: Alicante Amsterdam Baltimore Beijing Berlin Brussels Caracas Colorado Springs Denver Dubai Dusseldorf Frankfurt Hamburg Hanoi Ho Chi Minh City Hong Kong Houston London Los Angeles Madrid Miami Milan Moscow Munich New York Northern Virginia Paris Philadelphia Prague Rome San Francisco Shanghai Silicon Valley Singapore Tokyo Ulaanbaatar Warsaw Washington DC Associated offices: Budapest Jakarta Jeddah Riyadh Zagreb. For more information see www.hoganlovells.com

himself has expressed his desire to return to a "much tougher version" of the bans.[1] Indeed, by issuing EO-3, he has *already* reinstated many of the exclusions imposed by Section 2(c) of EO-2. The controversy therefore is not moot, and the Court can and should review the existing challenge to EO-2.

Nonetheless, if the Court determines that it is not prudent to resolve the important questions presented in this posture, the writ of certiorari should be dismissed as improvidently granted. The Court has often taken this course where the statute or order under review is altered during the pendency of the case. And because challenges to EO-3 are already underway in the lower courts, the Court will soon have another opportunity to determine the legality of the President's actions in the context of the new order.

No matter which course it takes, this Court should not vacate the decisions below. Because the case is not moot, there is no justification for vacatur. And even if this Court were to conclude that the case is moot, vacatur would be inappropriate. Any mootness would be entirely the consequence of the Government's voluntary actions—in managing the timing of the bans, in declining to seek a swift hearing on the merits, and in rebottling its old ban in a new order. It would be profoundly inequitable to permit the Government to use these maneuvers to obtain the very relief it sought on the merits: vacatur of the injunctions.

I. THIS CASE IS NOT MOOT AND THE COURT SHOULD HEAR THE CASE ON THE MERITS.

"A case becomes moot * * * when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (internal quotation marks omitted). A defendant claiming mootness as a result of its voluntary cessation of the challenged conduct has the "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not be expected to recur." *Id.* (quoting *Friends of the Earth*, 528 U.S. at 190). And even if a case appears to be mooted by the passage of time, it remains justiciable when the controversy is "capable of repetition, yet evading review." *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016). Under these principles, this case is not moot and the Court should adjudicate it on the merits.

1. At a bare minimum, the issues presented remain "live" because EO-2 continues to bar refugees from entering the country under Section 6(a). The refugee ban inflicts the same harm on the State of Hawaii and the individual plaintiffs that it has since the outset: It impedes Hawaii's refugee resettlement programs,

---

[1] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, post uploaded 6:37 A.M. E.S.T.), https://twitter.com/realdonaldtrump.

denigrates Dr. Elshikh and Doe as Muslims, and robs the State of its constitutional right to bar an establishment of religion.

Nor is it certain that this live controversy will conclude on October 24, 2017, when the 120-day period set forth in Section 6(a) is currently scheduled to end. Section 6(a) itself contemplates that "travel of refugees into the United States under USRAP" may only partially "resume" when the 120 days are up. Moreover, the Government's merits brief was conspicuously silent as to whether the travel and refugee bans would be permitted to expire in accordance with the terms of EO-2. Instead of guaranteeing termination dates, the Government asserted that the President could revise the "temporal scope" of EO-2 at will, as he had done through the June 14 memorandum declaring that the bans would not terminate within 90 or 120 days of the "effective date" announced in the Order's text. Pet. Br. 36-37.

In the end, the "90 day" travel ban ended 193 days after the "effective date" specified in EO-2. Even then, the Government did not inform the Court of the expiration until the day it occurred, and that letter made no mention of the refugee ban or its scheduled expiration date. In these circumstances, it is impossible to say with any certainty that the refugee ban will conclude on October 24, 2017.

2. Even if the ban is permitted to expire on October 24, that cannot moot the case. "Voluntary cessation does not moot a case or controversy unless subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (internal quotation marks omitted). The Government cannot meet its "heavy burden" to demonstrate that the President will not reimpose the policies announced in Section 2(c) and Section 6(a) of EO-2, or again lower the refugee cap midyear as in Section 6(b). *Id.*

In the past, this Court has held that a case is not moot where the government simply "announce[s]" the conclusion of a challenged policy, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 n.1 (2017), while continuing to "vigorously defend[] [its] constitutionality," *Parents Involved*, 551 U.S. at 719. And it has held that a finding of mootness is particularly improper where the government proclaims an intention to reenact "the same provision," *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11 (1982), or has already enacted a strikingly similar policy to replace the one it allegedly abandoned, *Ne. Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993).

This case features *all* of those elements. The Government has announced that the travel ban in Section 2(c) will no longer be enforced, but it has continued to defend the legality of that ban, and indeed continues to enforce the refugee ban in Section 6(a) that the lower courts enjoined based on the same legal flaws that were

present in Section 2(c). Moreover, the President has repeatedly expressed a desire not simply to "reenact" the bans in EO-2, but rather to implement a "much tougher version." And on the very day that he permitted EO-2's travel ban to expire, the President proclaimed a new travel ban that replicates the constitutional and statutory defects of the first, *see infra* pp. 5-6.

3. In addition, this controversy falls within the mootness exception for disputes that are "capable of repetition, yet evading review." *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Particularly given the Government's unwillingness to seek expedited consideration of the case, "it would be entirely unreasonable" to expect respondents to have obtained complete judicial review of EO-2 within the asserted span of the bans. *Id.* (internal quotation marks omitted). Furthermore, both Hawaii and Dr. Elshikh (who has several other family members in Syria) have a "reasonable expectation that [they] will again be subjected to the alleged illegality." *Id.* at 463 (internal quotation marks omitted); *see* Resp. Br. 25-26. EO-3 is already subjecting respondents to many of the same harms as EO-2: It separates Dr. Elshikh and Doe from their relatives, *see* EO-3 § 2(e), (g), and excludes tourists, students, and other visitors from the State, *id.* § 2.

In sum, the parties retain a live dispute regarding the legality of EO-2. Accordingly, this Court should once again set the case for argument and adjudicate the legality of the President's ongoing effort to usurp Congress's power over immigration and unilaterally ban hundreds of millions of foreign nationals—the overwhelming majority of them Muslim—from the United States.

II. IN THE ALTERNATIVE, THE COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED.

Alternatively, if the Court deems it preferable to decide the important legal questions posed by both EO-2 and EO-3 in the context of the more recent order, it may dismiss the present writ of certiorari. It could then grant review, as appropriate, once the lower courts have decided the legal issues as they apply to the particular facts of EO-3.

This Court has often taken this course where a statute or order under review is modified or repealed during the pendency of a case. In *Sanks* v. *Georgia*, 401 U.S. 144 (1971), for instance, the Court noted probable jurisdiction to review whether Georgia's tenancy laws were constitutional. Subsequently, however, the State "repealed virtually the entire statutory scheme * * * and replaced it with a new one." *Id.* at 147. Although the Court did "not * * * determin[e] that the case [wa]s moot," it could "perceive no other responsible course for this Court than to decline * * * to adjudicate the issues originally presented," in light of the "fundamental principle" that the Court should "exercise [its] powers of judicial review only as a matter of necessity." *Id.* at 150-151.

Likewise, in *Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497 (1971) (per curiam), the Court dismissed a case as improvidently granted where the federal statute under review was "repealed," and "a new statute * * * enacted" in its place, subsequent to the grant of certiorari. *Id.* at 498-499 (Harlan, J., concurring). Several Justices dissented on the ground that the new statute was "so similar to the [old one] that any necessary interpretation of the [old statute] would be equally applicable to the" new one. *Id.* at 504 n.1 (Douglas, J., dissenting). But as Justice Harlan explained, the statutes' similarity "d[id] not increase, but rather further diminishe[d], the appropriateness of [the Court's] ruling in the instant case." *Id.* at 501. The Court, he reasoned, should instead "await a case arising under the new statute," where it would "have the benefit of the thinking of lower federal courts" and could issue a definitive holding "govern[ing] the administration of the" statute. *Id.*

This Court has applied the same principle repeatedly since. *See Morris* v. *Weinberger*, 410 U.S. 422, 422 (1973) (per curiam) (dismissing case because "Congress amended the relevant statutory provisions"); *Cook* v. *Hudson*, 429 U.S. 165, 165-166 (1976) (per curiam) (dismissing writ in light of a statute enacted "after the * * * action here complained of"); *see also Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 108-109 (2001) (per curiam); *Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). Most recently, in *Medellin* v. *Dretke*, 544 U.S. 660 (2005) (per curiam), the Court dismissed a case as improvidently granted because—much like here—the President issued an order "[m]ore than two months after [the Court] granted certiorari" that purported to resolve the questions presented. *Id.* at 663-664; *but see Medellin* v. *Texas*, 552 U.S. 491, 523-532 (2008) (concluding, on subsequent review, that the order exceeded the President's authority).

If the Court does not wish to hear the present case in this posture, it should follow the same approach. Months after this Court granted review, the President issued EO-3, which largely "replace[s]" the previous "scheme * * * with a new one." *Sanks*, 401 U.S. at 147. While the issuance of that order does not moot the controversy with respect to the EO-2, it is nonetheless entirely proper for the Court to "await a case arising under the new [order]" to adjudicate the questions presented. *Triangle Improvement Council*, 402 U.S. at 501 (Harlan, J., concurring). That would enable this Court to obtain the considered views of the lower courts on EO-3's legality.

At the same time, dismissing the case would not prevent the Court from ultimately passing on the legal questions it granted certiorari to consider. EO-3 suffers from almost all of the same legal flaws as EO-2: The new order continues to flout Congress's directive that "no person shall * * * be discriminated against in the issuance of an immigrant visa because of the person's * * * nationality." 8 U.S.C. § 1152(a)(1)(A); *see* EO-3 § 2; Resp. Br. 44-46. It deepens the President's unprecedented assertion of authority under Section 1182(f) by imposing an

indefinite ban on aliens who do not resemble any of the three classes restricted by Presidents for the past century, and in the absence of any claim of an exigency in which it is impracticable for Congress to act. *See* Resp. Br. 40-44. And like EO-2, EO-3 is an outgrowth of the President's promised Muslim ban and imposes a set of restrictions designed to fulfill that promise. *See* Resp. Br. 54-56.

III. AT A MINIMUM, THE COURT SHOULD NOT VACATE THE JUDGMENTS BELOW.

Because the case is not moot, there is no basis for this Court to vacate the decisions below. But even if the Court were to find that the existing controversy is or soon will be moot, it should leave the lower court decisions in place. "It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate * * * equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). As the Court had long held, vacatur is proper only where a case became moot "'through happenstance'—that is to say, * * * 'due to circumstances unattributable to any of the parties.'" *Id.* at 23 (quoting *Karcher* v. *May*, 484 U.S. 72, 82-83 (1987)). A party may not obtain vacatur, in contrast, where it "caused the mootness by voluntary action," because that voluntary action "surrender[s] [petitioner's] claim to the equitable remedy of vacatur." *Id.* at 24-25; *see Alvarez* v. *Smith*, 558 U.S. 87, 95 (2009); *Karcher*, 484 U.S. at 82-83.

If the Court concludes that this case is moot, that outcome is plainly the result of the Government's "voluntary action," not mere "happenstance." From start to finish, the Government controlled the "temporal scope" of EO-2. Moreover, it has declined every effort to hasten resolution of this dispute, including by failing to "request[] that [the Court] expedite consideration of the merits." *Trump* v. *Int'l Refugee Assistance Project* ("*IRAP*"), 137 S. Ct. 2080, 2086 (2017) (per curiam); *see* Resp. Br. 27. It would be profoundly inequitable to permit the Government to control the timing of the case in this manner and then to use any resulting mootness to obtain the very relief it sought on the merits: vacatur of the injunction. *See Bancorp*, 513 U.S. at 27 (stating that vacatur may not be used as "a refined form of collateral attack on the judgment").

The lower court orders continue to play a vital role in guarding "the public interest." *Id.* They protect respondents and countless other Americans from the harms that would be inflicted if the President decided to resume the bans imposed by EO-2. *See IRAP*, 137 S. Ct. at 2087.[2] The Court should not use its equitable

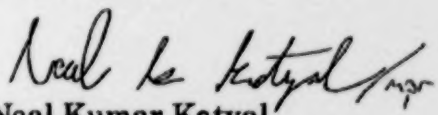
[2] The Government has previously made clear that, in its view, an injunction forecloses only the policies specifically enjoined. *See* U.S. Resp. to Mot. to Enforce Preliminary Injunction 1-2, 5-6, *Washington* v. *Trump* (W.D. Wash. Mar. 14, 2017) (No. 17-141). Thus, only the lower court's injunction against EO-2 would prevent the President from reimposing the bans in EO-2.

power to vacate those judgments. At a minimum, it plainly should not vacate the injunction against Section 6(a) prior to the actual expiration of the refugee ban.

* * * *

For the foregoing reasons, the case should be rescheduled for argument and adjudicated on the merits. In the alternative, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,



Neal Kumar Katyal
Counsel for Respondents

cc: Counsel of Record